IN THE

Supreme Court of the United States

October Term, 1971
Nos. 71-123 and 71-198

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

BURNS INTERNATIONAL SECURITY SERVICES, INC.

BURNS INTERNATIONAL SECURITY SERVICES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF FOR BURNS INTERNATIONAL SECURITY SERVICES, INC.

CHARLES G. BAKALY, JR.,
SEYMOUR SWERDLOW.

Of Counsel:
O'MELVENY & MYERS,
KATHLEEN PERATIS,
611 West 6th Street,
Los Angeles, Calif. 90017.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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BRIEF FOR BURNS INTERNATIONAL SECURITY SERVICES, INC.

Opinions Below.

The history of the opinions below is adequately set forth in the Board's Brief.*

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*The court of appeals action was entitled *"The William J. Burns International Detective Agency, Inc. v. NLRB."* After the court of appeals rendered its decision, The William J. Burns International Detective Agency, Inc., changed its name to "Burns International Security Services, Inc."

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Board's Brief.

Statutes Involved.

The relevant statutory provisions are adequately set forth in the Board's Brief.

Questions Presented.

1. In an unfair labor practice proceeding alleging a refusal to bargain may a sub-contractor, who was awarded a sub-contract to provide services at a facility, be held to be a successor of the previous sub-contractor and required to bargain with the union representing the previous sub-contractor's employees, where: (a) there was a total absence of dealings between the two sub-contractors; (b) the previous sub-contractor's performance at the facility constituted a small portion of its total business, the balance of which was not affected by the change of sub-contractors; (c) the performance of the sub-contract was integrated into the new sub-contractor's previously existing business; (d) there was a change in supervision at the facility by the new sub-contractor; and (e) within six months after the awarding of the sub-contract the previous sub-contractor's employees constituted less than a majority of employees employed at the facility?

2. Did the refusal of a sub-contractor, which was held to be a successor, to adopt, honor and enforce a collective bargaining agreement between the previous sub-contractor and the union representing the previous sub-contractor's employees constitute an unfair labor practice under the provisions of Sections 8(a)(5) and 8(d) of the Act, where there were no dealings between

the two sub-contractors and the successor sub-contractor did not consent to be bound by said agreement and was not a party to the negotiation thereof either by an agent or an alter ego?

Statement of the Case.

The Board's statement (Board Brief, p. 2, et seq.) requires some amplification.

Prior to July 1, 1967, plant protection services at the facility of Lockheed Aircraft Service Company, at Ontario International Airport, Ontario, California (herein the "Facility"), had been performed by The Wackenhut Corporation pursuant to a series of one year agreements between it and Lockheed. (Appendix, pp. 128; 129, 145.)* Wackenhut had employed 42 guards at the Facility. (Appendix, p. 76.) Lockheed was a prime Government contractor and as a result of Lockheed's Government contracts, Wackenhut Facility guards were required to obtain secret or top secret Government security clearances. (Appendix, p. 106; Appendix A, p. 27.)** Wackenhut guards were supervised by a supervisor who devoted approximately two-thirds of his time to the Facility; the balance of his time was devoted to different Wackenhut jobs. (Appendix A, pp. 23-24.)

Wackenhut's job at the Facility was one of the 200 to 300 plant protection jobs Wackenhut had in the State

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*The designation (Appendix, pp. 128, 129, 145) refers to pages 128, 129, and 145 of the Joint Appendix. Similar designations will be used herein.

**Relevant portions of the record herein were not included in the Joint Appendix. Such portions are attached hereto as Appendix A. The designation (Appendix A, p. 27) refers to page 27 of Appendix A. Similar designations will be used herein.

of California. (Appendix, p. 72.) All of Wackenhut's jobs in California (with the exception of a single job in Livermore, California) were supervised by its Director of West Coast Operations (herein the "Director") and his staff. (Appendix, pp. 70-71.) The Director reported to a vice-president who was located at Wackenhut's corporate headquarters in Coral Gables, Florida. (Appendix A, pp. 5, 6.) The Director's staff included the Manager of Physical Security, a coordinator, a personnel supervisor and eight area supervisors. (Appendix A, pp. 8-10, 28.) There were facility supervisors at approximately twenty-five percent of Wackenhut's jobs in California. (Appendix, p. 74.)

The Manager of Physical Security directly supervised the area supervisors and facility supervisors on all of Wackenhut's California jobs. (Appendix A, pp. 8-9.) The Coordinator coordinated the hiring of personnel and preparation of payrolls for all of Wackenhut's California jobs. (Appendix A, p. 10.) Each area supervisor was assigned to a specific geographic area and was responsible for the direct supervision of guards in his area. (Appendix A, p. 12.) The area supervisors hired, trained and disciplined guards. (Appendix A, pp. 12-14.) The personnel supervisor maintained personnel records, handled industrial relations and obtained security clearances for all Wackenhut guards in California. (Appendix A, p. 28.)

The wage rates, fringe benefits and working conditions of the Wackenhut guards in California were uniform and were established at Wackenhut's corporate headquarters. (Appendix, pp. 72-73.) All Wackenhut guards in California received a guard manual which had been prepared at its corporate headquarters. (Ap-

pendix A, pp. 7, 16.) The manual specified the basic duties and general orders for guards. (Appendix A, pp. 7-8.) Permanent personnel records, uniforms and supplies for Wackenhut guards in California were kept at Wackenhut's Los Angeles Office. (Appendix A, pp. 7, 22-23, 24-25.)

On March 8, 1967, following a Board conducted election,* United Plant Guard Workers of America and its Amalgamated Local Union No. 162 (herein "UPGWA"), was certified as the bargaining representative of the Wackenhut guards at the Facility. (Appendix, p. 146.)** Thereafter, Wackenhut and UPGWA entered into a collective bargaining agreement effective from April 29, 1967, until April 28, 1970 (herein the "Wackenhut agreement"). Among other things, the Wackenhut agreement provided a procedure to resolve any "justifiable complaint or grievance." The last step of said procedure was final and binding arbitration before an impartial arbitrator. (Appendix, pp. 152-154.)

On July 1, 1967, following competitive bidding, and pursuant to a sub-contract with Lockheed, Burns replaced Wackenhut as the sub-contractor performing plant protection services at the Facility. (Appendix, pp. 127, 135, 145.) Burns was in the business of providing

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*The election was conducted pursuant to a Stipulation For Certification Upon Consent Election. (Appendix p. 22.) Burns was not a party to said Stipulation, and no hearing was held regarding the appropriateness of the bargaining unit. (Appendix, pp. 37-39.)

**The bargaining unit included: "All full-time and regular part-time employees of Wackenhut performing plant protection duties as determined in Section 9(b)(3) of the Act at Lockheed, Ontario International Airport"; and excluded: "Office clerical employees, professional employees, supervisors and all other employees as defined in the Act." (Appendix, p. 17.)

plant protection services to companies throughout the United States. Burns had a nation-wide organization which was divided into divisions, branches and finally sub-offices. (Appendix, p. 184.) The Facility was located in the area supervised through the Ontario Sub-office* (herein the "Sub-office"). The Sub-office was within the Los Angeles Branch, and the Pacific Coast Division. (Appendix, pp. 91, 184.) The Sub-office was established before Burns was awarded the Facility subcontract by Lockheed. (Appendix, p. 93.) Burns utilized the Sub-office to supervise approximately 30 jobs in addition to the Facility job. (Appendix, p. 90.) Within the Burns organization that had responsibility for the Facility job was the Division Manager of the Pacific Coast Division, the Los Angeles Branch Manager, and the Sub-office Manager. (Appendix, p. 184.) On the Sub-Office Manager's staff were an Operations Supervisor and three field supervisors. (Appendix, pp. 89, 91-92.) The Operations Supervisor was the principal assistant of the Ontario Sub-office Manager, and directly supervised the field supervisors. (Appendix, p. 91.) The field supervisors regularly visited and supervised Burns guards on each job in the Sub-office area. (Appendix, pp. 91-92.) After July 1, 1967, Burns' performance at the Facility became part of the jobs for which such personnel were responsible. (Appendix, pp. 92-94.)

Burns had a communications system whereby a guard on each job reported to the Sub-office on an hourly basis. Job problems would then be brought to the at-

*As used hereinafter the terms "Sub-Office" and "Sub-Office area" shall refer to the area supervised through the Ontario Sub-Office excluding Los Angeles County. Burns guards in Los Angeles County were represented by the American Federation of Guards. (Appendix, p. 178.)

tention of a field supervisor through a radio network. Thus, any field supervisor could be called upon to handle a problem at any job in the Sub-office area. (Appendix, p. 92.)

On July 1, 1967, Burns employed 42 guards at the Facility, 27 of whom were former Wackenhut guards, and 15 of whom were Burns guards who had been transferred to the Facility from other Burns jobs. (Appendix, p. 146.) Burns employed former Wackenhut guards because they had the required Government security clearances. (Appendix, pp. 100, 106.) Burns did not employ Wackenhut's supervisor. Instead, it employed a full-time supervisor for the Facility.*

All Burns guards within the Sub-office area had the same pay scales, vacations, working conditions, hospitalization plan, fringe benefits, and guard manual. (Appendix, pp. 95, 97-99.) Such guards were subject to the same disciplinary procedures, general orders, and rules and regulations of personnel conduct. (Appendix, pp. 95, 99.) Burns had a personnel manager who maintained personnel records, prepared payrolls, conducted background investigations, supervised guard training and conducted terminal interviews for all guards within the Sub-office. (Appendix, pp. 95-96.) Master personnel records for all of Burns guards in the Sub-office area were kept at the Los Angeles Branch, with duplicate personnel records at the Sub-office. Personnel records were not kept, nor were payroll checks prepared at the Facility. (Appendix, pp. 96, 97-98.) Guards in the Sub-office area were recruited by the Ontario Man-

*Prior to July 1, 1967, said supervisor had been one of the Wackenhut guards at the Facility, but had not held a supervisory position. (Appendix, p. 94.)

ager, the Operations Supervisor and Los Angeles Branch Office personnel. (Appendix, pp. 95-96.) Uniforms and other equipment and supplies of the guards were purchased and maintained at the Sub-office, and were not purchased or maintained at the Facility level. (Appendix, p. 97.)

It was Burns practice within the Los Angeles Branch to transfer guards, both temporarily and permanently from one job to another. (Appendix, p. 99.) There were at least 100 temporary transfers per week and 500 to 600 permanent transfers per year. (Appendix, pp. 99-100.) Such practice of interchange had impact on the Facility work force. Within six months after Burns commenced performing, Burns employed 52 guards at the Facility; 23 of whom were transferred thereto from other Burns jobs, 8 of whom were new hires, and 21 of whom were former Wackenhut guards. By December 31, 1968, there were 49 Burns guards at the Facility; 32 were transferred from other Burns jobs, 4 were new hires, and 13 were former Wackenhut guards. (Only 9 former Wackenhut guards worked full time.) By October 31, 1969, there were 29 Burns guards at the Facility; 18 were transferred from other Burns jobs, 2 were new hires, and 9 were former Wackenhut guards. (Only 7 former Wackenhut guards worked full time.) (See Appendix, pp. 30-35.)

The Board held that Burns was Wackenhut's successor, and therefore was required to recognize UPGWA as exclusive representative of Facility guards. The Board also held that Burns, as a successor employer, was required to adopt, honor and enforce the Wackenhut agreement, and failure to do so was an unfair labor practice in violation of Section 8(a)(5) of the Act. Insofar as is relevant herein, the court of appeals af-

firmed that part of the Board's order holding that Burns was Wackenhut's successor; and therefore was required to recognize UPGWA as exclusive representative of its Facility employees. However, the court of appeal denied enforcement of that part of the Board's order which required Burns to adopt, honor and enforce the Wackenhut agreement.

Summary of Argument.

It will be shown herein that the court of appeals' enforcement of that portion of the Board's decision requiring Burns—as a successor employer—to recognize and bargain with the UPGWA should be reversed. The court's judgment enforcing such order was based upon its conclusion that the employing industry, which according to the court consisted of the Facility operations of Wackenhut and Burns, remained unchanged in spite of the change in plant protection sub-contractors. While the Board and the courts have enumerated the relevant factors for determining whether an employing industry has changed, there has been a failure to define the criteria for determining the entity to be analyzed for the presence of such factors.

It will be shown that the Facility operations of Burns and Wackenhut were not employing industries because such operations were not viable business entities. Important business decisions of Burns and Wackenhut, as well as decisions affecting their Facility employees, were not made at the Facility level. The Facility operations of Burns and Wackenhut were integrated into and were indistinguishable parts of larger business entities. Only by considering Burns' business in the Sub-office area, and Wackenhut's business in California, as employing industries is it possible to properly: (a) evaluate whether

the employing industry changed as a result of the award to Burns of the Facility sub-contract, and (b) preserve the protected rights of Facility employees to be represented by agents of their own choice. It will be shown that the employing industry was substantially changed when Burns began performing at the Facility.

If the Court determines that Burns was not Wackenhut's successor, it will not be necessary to consider the issue of whether Burns was bound by the Wackenhut agreement. However, assuming *arguendo* that the Court does find that Burns was Wackenhut's successor, it will be shown that the court of appeals was correct in its refusal to enforce that portion of the Board's order that required Burns to adopt, honor and enforce the Wackenhut agreement. The Board's order on the contract issue is contrary to Section 8(d) and legislative history of the Act which forbids imposing a collective bargaining agreement upon a non-consenting party. Further, such order is contrary to *H. K. Porter Co., Inc. v. NLRB*, 397 U.S. 99 (1970). The court of appeals correctly held that enforcement of the Board's order on the contract issue would create serious inequities.

The Board's decision on the contract issue was based upon its broad and unwarranted expansion of *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964). The Board failed to perceive that *Wiley*, which was decided as part of the federal law favoring arbitration as the most desirable means for resolving industrial disputes, could not be expanded to apply in an unfair labor practice case because of the proscription of Section 8(d) of the Act.

ARGUMENT.

I.

THE FACILITY OPERATION WAS NOT AN EMPLOYING INDUSTRY UNDER EITHER BURNS OR WACKENHUT; AND, THEREFORE WHEN BURNS COMMENCED PERFORMING AT THE FACILITY THERE WAS NO CONTINUITY OF AN EMPLOYING INDUSTRY.

Since *NLRB v. Colten,* 105 F.2d 179 (6th Cir. 1939), there have been numerous decisions concerning the survival of statutory duties under the Act after a change of employer. In *NLRB v. Colten,* the respondent argued that because the death of a partner had dissolved an employer which was organized as a copartnership, the affirmative provisions of a Board order directing reinstatement of certain employees and the payment of back wages, became inoperative. The court articulated for the first time, but did not define, the concept of "the employing industry." The court found that the change of employers had not affected the employing industry, and held that the Board's order remained in force in spite of the dissolution of the partnership.

Subsequent to *NLRB v. Colten,* this Court in *Southport Petroleum Co. v. NLRB,* 315 U.S. 100 (1942) considered the plea of an employer who argued that because of a change in corporate ownership, it was not bound by a Board order remedying unfair labor practices which had been committed by the employer under its previous ownership. The Court, in rejecting the employer's contention stated:

> ". . . If there was merely a change in name or in apparent control there is no reason to grant the petitioner relief from the Board's order of reinstatement; instead there is added ground for com-

> pelling obedience. *Whether there was a bona fide discontinuance and a true change of ownership—which would terminate the duty of reinstatement created by the Board's order—or merely a disguised continuance of the old employer, does not clearly appear,* and accordingly is a question of fact properly to be resolved by the Board on direct resort to it, or by the court if contempt proceedings are instituted.". (Emphasis added.) (315 U.S. at 106.)

The clear implication in *Southport Petroleum Co. v. NLRB* is that where there is a bona fide discontinuance of the manner in which a business is conducted, together with a true change in ownership, a Board's remedial order will not apply to the new owner.*

The Board and the courts have centered their analysis in successorship cases on the employing industry. However, there has been a total failure to articulate exactly what an employing industry is. Such failure has caused confusion as to the criteria for determining the entity to analyze when deciding whether there has been a change in the employing industry.

In the instant case, the court of appeals and the Board assumed that Wackenhut's and then Burns' operations at the Facility were employing industries. Before this Court, the Board's Counsel urges that the employing industry is—"the provision of guard service for Lockheed at the airport." (Board Brief, p. 15.) Neither the court below, the Board, nor the Board's Counsel

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**Cf. Perma Vinyl*, 164 N.L.R.B. 968 (1967), *enforced sub nom., United States Pipe and Foundry Co. v. NLRB*, 398 F.2d 544 (5th Cir. 1968).

have indicated any reason why the "employing industry" should be so narrowly defined. Indeed, focusing upon the Facility operations of Burns and Wackenhut as employing industries frustrates the purposes of the Act. Such a narrow definition of the employing industry precludes a realistic evaluation of impact of the change sub-contractors on: (a) the employees involved; and, (b) the relationship of the Facility sub-contract to the overall operations of Wackenhut and Burns. In addition, isolating the Facility operation as an employing industry will fragment Burns' business conducted through the Sub-office, and impair Burns' ability to operate efficiently.

In order to accomplish the purposes of the Act, when applying the successorship doctrine, it is essential that the entity considered the employing industry be an "industry"—a business within which are the managerial authority and skill which are necessary to both run a business and to make decisions on matters that are critical to employees, i.e., wages, hours and working conditions, industrial relations policies and practices, and the resolution of employee grievances. An employing industry is more than an appropriate bargaining unit.* It will be shown that the Facility operation of Burns and Wackenhut did not meet these criteria.

Prior to July 1, 1967, Burns and Wackenhut had separate and substantial business organizations through which they provided plant protection services, as business competitors. Indeed, with respect to the Facility,

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*In selecting an appropriate bargaining unit the courts primarily consider the ability of managers within the unit to make decisions on matters which would be the subjects of collective bargaining. See, e.g., *NLRB v. Solis Theatre Corp.*, 403 F.2d 381, 383 (2d Cir. 1968); *NLRB v. Davis Cafeteria, Inc.*, 396 F.2d 18, 20 (5th Cir. 1968).

Burns began providing services pursuant to a sub-contract which it received after competitive bidding. Such sub-contract commenced upon the termination by Lockheed of its sub-contract with Wackenhut. It is clear and undisputed that: (a) Burns is not Wackenhut's *alter ego;* (b) all transactions between Lockheed and Wackenhut, and Lockheed and Burns were conducted in good faith; and (c) there were no dealings between Wackenhut and Burns.

Wackenhut's Facility sub-contract was merely one out of between 200 or 300 similar contracts to provide plant protection services in California. All of Wackenhut's contracts were supervised by the Director and his staff. Wage rates, fringe benefits and working conditions of all Wackenhut guards in California, including those at the Facility, were established at Wackenhut's corporate headquarters. Wackenhut Facility guards shared common supervision with guards at other Wackenhut jobs. Personnel records, labor relations handling, preparation of payrolls, and coordination of hiring of all Wackenhut guards in California, including those at the Facility, were controlled by the Director and his staff.

On July 1, 1967, Burns integrated the performance of its Facility sub-contract into its already existing business, which involved 30 other plant protection contracts, in the Sub-Office area. The Facility operation was added to the responsibility of the Sub-Office Manager and his staff. Facility guards under Burns worked for different supervisors, and became subject to the same working conditions, pay scales and fringe benefits as other Burns guards in the Sub-Office area. Personnel records, labor relations, payrolls, and supervision of Facility guards were handled in common with other guards in the Sub-Office area.

Under Burns, the Facility guards became subject to Burns existing practice of frequently interchanging Burns guards from one Burns job to another, both temporarily and permanently. Under Wackenhut, interchange had been minimal. (Appendix A, pp. 17-18, 21-22.) Pursuant to Burns practice of interchanging guards, on July 1, 1967, while initially staffing its Facility guard force, Burns transferred 15 guards to the Facility from its other jobs. Such guards constituted more than one-third of the Facility guards. Within six months, and thereafter, as a result of employee interchange and new hires, former Wackenhut guards consisted less than a majority of Facility guards.

After July 1, 1967, except for the Facility job, Wackenhut's overall business in California was unaffected by Lockheed's termination of its Facility sub-contract. Similarly, the only difference in Burns' overall business in the Sub-Office area after July 1, 1967, was the addition of the Facility sub-contract.

Under both Burns and Wackenhut, the Facility operation was not a viable business entity. None of the important decisions that affected the conduct of the business and had impact on employees was made at the Facility level. Wackenhut's Facility sub-contract was integrated into and was an indistinguishable part of its entire California business. Under Burns, the Facility sub-contract was integrated into and was an indistinguishable part of the Sub-Office business. The significant aspects of the employment of Facility guards were dependent upon the organization they were employed by rather than the particular location of the post to which they were assigned.

The performance of plant protection services at the Facility was not an employing industry. Prior to July 1,

1967, the employing industry was Wackenhut's business in California. Thereafter, the employing industry was Burns' business in the Sub-Office area. Therefore, on the Facility level, there was no continuity in the employing industry after July 1, 1967. Rather, the change in sub-contrators constituted a substantial change in the employing industry.

The instant case is legally indistinguishable from *NLRB v. Alamo White Truck Service, Inc.*, 273 F. 2d 238 (5th Cir. 1959), where the court refused to enforce a Board bargaining order which was based upon the same type of myopic analysis that occurred herein. The original employer ("White") was a national manufacturer of trucks which operated a retail branch, composed of several departments, in San Antonio, Texas. White closed the branch, and entered into an agreement with its principal salesman who established an independent business ("Alamo") to service and sell trucks under a local retailership agreement. Alamo purchased White's inventory of parts, tools, shop and office equipment. It used White's building under a one year lease for the servicing of trucks and retained one of White's supervisors as well as eight of the fourteen employees of White. Thus, when Alamo commenced business a majority of its work force consisted of former White employees who were engaged in the same work, at the same location and under the same supervision.* The court concluded that Alamo was a different business than White, and therefore the employing industry had changed. The court noted:

> "Alamo did not purchase the accounts receivable. It did not assume any of the indebtedness or obligations of the old factory branch. It did not ac-

*See *Alamo White Truck Service, Inc.*, 122 N.L.R.B. 1174 (1959).

> quire any of White's books and records. A new system of bookkeeping was installed. . . . Alamo arranged for its own insurance with companies which were not the same as those that had carried White's insurance. . . . Alamo obtained a new Texas business license. Alamo employed a different method of financing the sale of automotive equipment." (273 F.2d at 241.)

In addition, the court based its holding upon the fact that Alamo did not operate all the departments that had previously been operated by White, and that there had been a change from a national to a local business.

Just as Alamo did not operate all of White's departments, Burns did not take over all of Wackenhut's contracts in California. Neither Burns nor Alamo purchased accounts receivable, books, records, or assumed obligations. Under Burns, the Facility job became part of the Sub-Office business which covered a small portion of the area and approximately ten percent of the number of jobs encompassed in Wackenhut's business. Thus, even though both Wackenhut and Burns are national organizations, like Alamo, Burns brought more localized supervision of the Facility guards than there had been under Wackenhut.* *Accord, Machinists v. NLRB,* 414 F.2d 1135 (D.C. Cir. 1969), cert. denied 397 U.S. 935 (1970); and *NLRB v. Aluminum Tubular Corp.,* 299 F.2d 595 (2d Cir. 1962).

The instant case is also similar to *Northwest Galvanizing Co.,* 168 N.L.R.B. 26 (1967), where the Board found that there had been a change in the em-

*In *Alamo White Truck Service, Inc.,* 122 N.L.R.B. 1174, 1176 (1959), the Board had held that Alamo was a successor because a majority of employees of Alamo were former White employees, who did the same work, at the same location, under the same supervision, as they had for White.

ploying industry. Northwest purchased a complete operation which had been a division of the seller; and then continued substantially the same operation at the seller's site, pending completion of a new building. Northwest agreed to: (a) perform the seller's work for five years; (b) complete its pending orders; (c) employ the seller's employees, including a foreman; and (d) retain the seller's superintendent for 90 days. The purchased operation was thereafter moved to a new building, and intergrated into Northwest's existing operation. When this occurred the employees of the seller were dispersed through the Northwest's plant. Northwest was held not to be a successor, because it did not acquire a business, but rather, purchased an operation for addition to its already existing business. The Board noted that the additional operation was integrated into Northwest's existing business, rather than continued as the seller's operation. Accord, *Federal Electrical Corp.*, 167 N.L.R.B. 469 (1967).

As in *Northwest Galvanizing Co., supra,* Burns did not simply take over Wackenhut's business. It was awarded a sub-contract by Lockheed, the performance of which was executed as part of its total business in the Sub-Office. Just as *Northwest Galvanizing* integrated the acquired operation into its total business, Burns integrated its Facility sub-contract into its business in the Sub-Office. Northwest was not a successor, and neither was Burns.

Lincoln Private Police, Inc., 189 N.L.R.B. No. 103, 76 L.R.R.M. 1727 (1971) is another Board decision which is irreconcilable with the decisions herein. In *Lincoln Private Police, Inc.*, Industrial Security Guards, Inc. ("Industrial") was an employer that provided plant protection services. Industrial ceased doing business, and Lincoln, an employer which also provided plant pro-

tection services, solicited and obtained 42 percent of Industrial's former customers. Lincoln did not assume any of industrial assets or liabilities. It used its own uniforms, vehicles, equipment and offices. Another employer which also provided plant protection services, also obtained a substantial percentage of Industrial's former customers. Lincoln's work force consisted of 66 employees, 61 of whom were former Industrial employees who continued to work at the location of the same customer, at the same post they worked at under Industrial. The Board held that Lincoln did not violate the Act when it refused to bargain with the union that represented Industrial's employees in a city-wide bargaining unit.

In both the instant case and *Lincoln Private Police, Inc.*, there were no dealings between the alleged successor and predecessor—instead plant protection agreements were obtained through direct solicitation of customers. In both cases, there was no assumption of assets or liabilities; and different uniforms, vehicles and equipment were used. Both Lincoln and Burns acquired less than a majority of the alleged predecessor's customers. Indeed, Lincoln took over 42 percent of Industrial's former customers, while in the instant case Burns took over less than one percent of Wackenhut's former customers. (One customer out of 200-300 Wackenhut customers.)*

The cases cited by the Board's counsel are inapposite. Such cases did not consider the problem created

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*The Board's counsel argues that *Lincoln Private Police, Inc., supra,* is distinguishable because Industrial's business was divided among several firms—"with the alleged successor acquiring less than a majority of the prior employer's customers." (Board Brief, p. 19.) However, the Board's counsel fails to mention that 61 of 66 of Lincoln's employees were former union members who worked at the same post as they did for Lincoln.

by the transfer of an operation—which was not in itself a business entity but instead had been part of a business—and the integration of such operation into another business. Indeed, the cases the Board's counsel relies upon militate against considering the Facility operation an employing industry, as they all involved situations where there was a transfer of a complete business entity which remained virtually intact after the change in ownership.

For example, *NLRB v. Zayre Corp.*, 424 F.2d 1159 (5th Cir. 1970), the successor purchased the assets of a discount department store which had previously been operated as an independent unit. The successor then continued to operate the same discount department store on the same premises. Both before and after the change in ownership, the store remained a viable business entity—"a retail discount house." In *NLRB v. Armato,* 199 F.2d 800 (7th Cir. 1952), the successor leased the building, machinery and fixtures of a business which manufactured and sold metal products. It also purchased raw materials, goods in process and finished goods. Further, the successor kept most of the original owner's customers. Both before and after the change in ownership there was a complete business entity which had been engaged in the manufacture and sale of metal products. Similarly, *NLRB v. Ideal Laundry Corp.*, 422 F.2d 801 (10th Cir. 1970); *NLRB v. Quaker Tool & Die, Inc.*, 403 F.2d 1021 (6th Cir. 1968); *Makela Welding Inc. v. NLRB*, 387 F.2d 40 (6th Cir. 1967); *Overnite Transportation Co. v. NLRB*, 372 F.2d 765 (4th Cir.), cert. denied 389 U.S. 838 (1967); *NLRB v. Auto Ventshade, Inc.*, 276 F.2d 303 (5th Cir. 1960) and *Chemrock Corp.*, 151 N.L.R.B. 1074 (1965) involved the change in ownership by sale or lease of stock or assets of business entities.

The two cases relied upon by the Board's counsel which involve changes in contractors are also inapposite. *Tom-A-Hawk Transit Inc. v. NLRB*, 419 F.2d 1025 (7th Cir. 1969) involved a situation where a company that operated the public transportation bus system for an entire city under an exclusive franchise ceased doing business. An identical franchise was then granted to Tom-A-Hawk, a company whose entire business was providing bus service to the same city. The successor and predecessor utilized basically the same employees. Thus, even though there had been no dealings between the two companies, it is clear that they were both operating virtually identical business enterprises. The same is true of *Maintenance, Inc.*, 148 N.L.R.B. 1299 (1964), which involved a change in custodial contractors at a plant of NASA in Huntsville, Alabama. There was no indication that either the predecessor or the successor performed work at any other location, or that the work at the Huntsville location, which utilized approximately 250 custodial employees, was performed as part of a larger business operation by either the successor or the predecessor.

It is submitted that the change in sub-contractors from Wackenhut to Burns caused a substantial change in the employing industry of Facility guards. Under Burns, Facility guards became subject to a different management—both with respect to structure and individuals. Under Burns, the Facility operation was directly supervised through the Sub-Office which was part of the Los Angeles Branch and Pacific Coast Division. Wackenhut had no sub-office, branch or division. Instead it had a single California business. Burns and Wackenhut had different supervisors and different practices and procedures both with respect to labor relations and business conduct. From a business standpoint,

except for the Facility, Burns and Wackenhut did not operate at the same location, they had different customers, utilized different offices, equipment, procedures and uniforms. Burns did not take over a majority of Wackenhut's total employee complement in California. Indeed, former Wackenhut employees did not constitute a majority of Burns employees in the Sub-Office area. Even at the Facility, as a result of interchange and new hires, within six months after July 1, 1967, former Wackenhut guards constituted less than a majority of Burns Facility employees.

The successorship doctrine is designed to protect employees from the adverse effects of a change in ownership which has little substantive effect on the enterprise by which they are employed, while at the same time enabling such employees to select bargaining agents of their own choice to deal with the employer. Since the employing enterprise was substantially changed, Burns Facility employees had the right to decide anew whether they wished to be represented by a union. See the opinion of the court by then Circuit Judge Burger in *Machinists v. NLRB*, 414 F.2d 1135, 1138 (D.C. Cir. 1969), cert. denied 397 U.S. 935 (1970).*

The decision below will have an adverse impact upon Facility employees and Burns. Such decision will impair Burns ability to operate its business in the most efficient manner. Burns policy of interchanging em-

*Before the court of appeals, Burns did not contest the portion of the Board's order that relates to alleged violations of Sections 8(a)(1) and (2) of the Act by unlawfully assisting and recognizing the American Federation of Guards. There is uncontradicted testimony that Burns has never bargained collectively with the American Federation of Guards with respect to the Facility. (Appendix, p. 107.) In addition, since there was no claim that Burns discriminated with respect to the employment of Facility guards, Burns has not petitioned for review of that portion of the court of appeals order covering the Section 8(a)(1) and (2) violation.

ployees on a temporary and permanent basis to meet the needs of the business will be jeopardized. It is also possible that future application of such decision could cause a multiplicity of unions throughout the Sub-Office area which would tend to further fragment the Sub-Office business, and reduce Burns ability to maintain the Sub-Office as a single integrated and efficient operation. Such multiplicity of unions could also cause industrial strife by increasing the number of jurisdictional disputes between the various unions. The jobs of Facility guards are most secure if Burns is able to provide Lockheed efficient and competent plant protection services. Any decision which tends to reduce efficiency is contrary to the interest of Burns employees, Burns, and the economy in general.

This Court should reverse the judgment of the court of appeals that Burns was Wackenhut's successor, and was therefore required to recognize and bargain with UPGWA.

II.

EVEN IF BURNS WERE WACKENHUT'S SUCCESSOR, ITS REFUSAL TO ADOPT, HONOR AND ENFORCE THE WACKENHUT AGREEMENT DID NOT VIOLATE SECTIONS 8(a)(5) AND 8(d) OF THE ACT.

In the instant case, the Board reversed the long standing rule of law that a successor employer is not bound by its predecessor's collective bargaining agreement, unless it agrees to assume such agreement. (See, e.g., *Rohlik, Inc.*, 145 N.L.R.B. 1236, 1242 n. 15 (1964).) The Board, for the first time held that a successor employer is, as a matter of law, bound by its predecessor's collective bargaining agreement, and that the refusal of a successor to adopt, honor and enforce said agreement violates Sections 8(a)(5) and

8(d) of the Act. The Board has thereby created a new unfair labor practice.

In holding that Burns was bound by the Wackenhut agreement, the Board relied upon this Court's decision in *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543 (1964) (herein "*Wiley*"). The court of appeals below refused to enforce the portion of the Board's order related to the Wackenhut agreement, holding that said order was proscribed by Section 8(d) and the policy of the Act against imposing agreements upon non-consenting parties. In addition, the court of appeals held that the Board order violated this Court's decision in *H. K. Porter Co., Inc. v. NLRB,* 397 U.S. 99 (1970) (herein "*H. K. Porter*"). The court of appeals found that *Wiley* was inapposite.*

A. The Board Does Not Have the Power to Hold That Burns' Refusal to Adopt, Honor and Enforce the Wackenhut Agreement Violated Sections 8(a)(5) and 8(d) of the Act.

The original National Labor Relations Act (Act of July 5, 1935, ch. 372, 49 Stat. 449) did not vest the authority to enforce collective bargaining agreements in either the Board or the courts. Indeed, little consideration was given to a proposed section that would have made the breach of a collective bargaining agreement an unfair labor practice.**

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*Cf. *Ranch-Way, Inc. v. NLRB,* 445 F.2d 625 (10th Cir. 1971), *cert. pending,* Docket No. 71-589.

**See Comparison of S. 2926 and S. 1958, 1 Legis. Hist. of NLRA 1319, 1337, in which it is reported that William H. Davis recommended that Section 8 be amended to add the following language:

> "It shall be an unfair labor practice for either party to an agreement that has been registered pursuant to Section 12 of this Act, to violate or fail to observe any condition of such agreement."

Such language was not included in any of the versions of the bill.

The legislative history of the adoption of the Act in 1947 clearly demonstrates that Congress intended to restrict the Board's powers concerning collective bargaining agreements. The Senate bill* contained Section 8(d), Section 301, and a Section 8(a)(6). Section 8(a)(6), which was ultimately rejected by Congress, made it an unfair labor practice for an employer:

> "[T]o violate the terms of a collective-bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration. . . ."**

The Report of Committee of Conference of both Houses gave the following reason for rejecting Section 8(a)-(6):

> ". . . The conference agreement omits this provision of the Senate amendment. *Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual*

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*S. 1126, As Reported, 1 Legislative History of the Labor Management Relations Act 99, 111, 114, 151 (herein "Legis. Hist. LMRA"), and in the House version as passed by the Senate, H.R. 3020, As Passed Senate, 1 Legis. Hist. LMRA 226, 239, 242, 279.

**The view of the Senate minority, which opposed Section 8(a)(6) and ultimately prevailed, was that:

> ". . . [This] proposal . . . [Section 8(a)(6)] contain[s] no provision requiring the disputants to utilize procedures prescribed by their collective-bargaining agreement or to exhaust mediation and conciliation processes prior to resort to the Board. . . . [R]esort to these is not required as a condition precedent to filing a charge of an unfair labor practice for breach of a collective-bargaining agreement.
>
> *"The effect of this omission would be to discourage the voluntary adjustment of disputes and unnecessarily increase the number of cases coming before the Board.* . . . The results, therefore, might well be a disuse of the collective-bargaining process and a congestion of cases before the Board which would make it impossible to settle disputes promptly in an area where prompt settlement is essential to the cause of industrial peace." Senate Minority Report No. 105, Pt. 2, On S. 1126, 1 Legis. Hist. LMRA 463, 474-75. (Emphasis added.)

processes of the law and not to the National Labor Relations Board." House Conf. Rep. No. 510 On H.R. 3020, 1 Legis. Hist. LMRA 505, 546. (Emphasis added.)

The purpose of Section 301 was to make both unions and employers equally amenable to a federal court action for breach of a collective bargaining agreement. See, e.g., House Report No. 245 On H.R. 3020, 1 Legis. Hist. LMRA 292, 297; Remarks of Senator Smith, 92 Cong. Rec. 4410 (1947), 2 Legis. Hist. LMRA at 1145-1146.

The Court in *H. K. Porter* recounted this history as follows:

"The object of . . . [the Act] was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement. But it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement. This fundamental limitation was made abundantly clear in the legislative reports accompanying the 1935 Act. The Senate Committee on Education and Labor stated:

" 'The committee wishes to dispel any possible false impression that this bill is designed

to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.' " (397 U.S. at 103-04.)

In *H. K. Porter*, the Court observed that in 1947, when Congress reviewed the experience under the National Labor Relations Act, it noted the Court's language in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937), where the Court had stated that the Act does not compel agreements. Referring specifically to *NLRB v. Jones & Laughlin Steel Corp.*, the House Committee Report accompanying the Act stated:

" 'Notwithstanding this language of the Court, the present Board has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make. . . .

. . . .

" '[U]nless Congress writes into the law guides for the Board to follow, the Board may attempt to carry this process still further and seek to control more and more the terms of collective-bargaining agreements.' " (397 U.S. at 105-106.) (Footnotes omitted.)

As a result of the fear of Board action to regulate the terms of collective bargaining agreements, Section 8(d) was added to the Act, with the condition that

the duty to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession." With respect to Section 8(d), the Court in *H. K. Porter* stated:

> "The object of this Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions." (*Id.* at 103.)

In *H. K. Porter*, the Board had held that an employer violated Section 8(a)(5) of the Act by adamantly refusing to agree to a dues checkoff provision, intending thereby to frustrate the consummation of any collective bargaining agreement. The Board had ordered the employer to "'[g]rant to the Union a contract clause providing for the checkoff of union dues.'" *Id.* at 102. The Court, agreeing that the employer violated Section 8(a)(5), held that because of Section 8(d) and the legislative history of the Act:

> "[W]hile the Board does have the power . . . to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement." (*Id.* at 102.)

The Court said:

> "*It would be anomalous indeed to hold that while § 8(d) prohibits the Board from relying on a refusal to agree as the sole evidence of bad-faith bargaining, the Act permits the Board to compel agreement in that same dispute.* The Board's remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of

> the Act itself. One of these fundamental policies is freedom of contract. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based —private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." (*Id.* at 108.) (Emphasis added.)

Even before *H. K. Porter,* limitations on the Board's power with respect to collective bargaining agreements had been delineated. The Board does not have the plenary authority to enforce collective bargaining agreements. *NLRB v. Strong,* 393 U.S. 357, 360 (1969); *Charles Dowd Box Co. v. Courtney,* 368 U.S. 502, 513 (1962). In *NLRB v. American National Insurance Co.,* 343 U.S. 395 (1952), the Board had found an employer's continued insistence on the inclusion of a broad management rights clause a violation of Section 8(a)(5). The Board ordered the employer to refrain from further insistence on this clause. The court of appeals refused to enforce the Board's order, concluding that the employer was not precluded from further bargaining for such a clause. This Court affirmed, stating:

> "[T]hat the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." (343 U.S. at 404.)

In *Teamsters, Local 357 v. NLRB,* 365 U.S. 667, 676-77 (1961), this Court overturned the Board's holding that the inclusion of a hiring hall provision

in a collective bargaining agreement was a *per se* violation of Section 8(a)(5), and stated:

> "Moreover, the hiring hall, under the law as it stands, is a matter of negotiation between the parties. The Board has no power to compel directly or indirectly that the hiring hall be included or excluded in collective agreements."*

On the basis of the foregoing, the court of appeals below, in an opinion by Circuit Judge Paul R. Hays, correctly held that the Board's decision that Burns must adopt, honor and enforce the Wackenhut agreement violated Section 8(d) and the legislative history of the Act. In addition, the court of appeals held:

> ". . . The action of the Board in this case is contrary to the letter as well as the spirit of the Supreme Court's recent decision in *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970) . . ." (Appendix, p. 190.)

It is significant that even though *H. K. Porter* was decided before the Board's decision herein, it was not cited by the Board. However, subsequent to the Board's decision below, the Board did consider *H. K. Porter*. In *Ex-Cell-O Corp.*, 185 N.L.R.B. No. 20, 74 L.R.R.M. 1740 (1970), *enforced on other grounds, Ex-Cell-O Corp. v. NLRB*, ... F.2d ....., 77 L.R.R.M. 2547 (D.C. Cir. 1971), the employer had clearly violated Section 8(a)(5) and 8(d) of the Act by its refusal to

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*Accord: *Steelworkers v. NLRB*, 390 F.2d 846, 853 (D.C. Cir. 1967), *cert. denied* 391 U.S. 904 (1968); *Retail Clerks v. NLRB*, 373 F.2d 655 (D.C. Cir. 1967); *Siskin Steel and Supply Co.*, 160 N.L.R.B. 1038, 1040 (1966); *Hyde's Super Market*, 145 N.L.R.B. 1252, 1253, enforced 339 F.2d 568 (9th Cir. 1964); *United Telephone Co. of the West*, 112 N.L.R.B. 779, 782 (1955).

bargain in good faith. The Trial Examiner, as a remedy for this violation, ordered the employer to pay the employees involved the benefits which the Trial Examiner concluded they would have received if the employer had bargained in good faith. The Board, while agreeing that an unfair labor practice had been committed, set aside the Trial Examiner's order, holding that *H. K. Porter* prevented it from ordering an employer to "accept full responsibility" for an agreement to which the employer had not agreed. In contrast, in the instant case the Board ordered Burns to accept full responsibility for the Wackenhut agreement—to which it had not agreed. The Board's decision in *Ex-Cell-O* is irreconcilable with its holding herein.*

The Board's action herein went beyond what was declared improper by this Court in *H. K. Porter* and by the Board in *Ex-Cell-O*. Obviously, since the Board lacks the power to order agreement to, or compliance with, a specific provision of a collective bargaining agreement, and since the Board lacks the power to order the proposal of or the non-insistence upon a specific provision of a collective bargaining agreement, it follows that the Board lacks the power to order agreement to and compliance with, an entire collective bargaining agreement. The Board's order that Burns fully accept the Wackenhut agreement is tantamount to enactment

*In *Electrical Workers v. NLRB*, 426 F.2d 1243 (D.C. Cir.), *cert. denied*, 400 U.S. 950 (1970), the court held that in the case of "a flagrant" violation of the Act the Board had the power under Section 10 to enforce an order which was similar to the order ruled improper in *Ex-Cell-O*. The Board in *Ex-Cell-O* expressed its disagreement with *Electrical Workers v. NLRB*, and continues to follow its decision in *Ex-Cell-O*. Further, no other court of appeals has followed *Electrical Workers v. NLRB*.

by the Board of the rejected Section 8(a)(6), and is directly contrary to Congressional intent.* The anomaly this Court referred to in *H. K. Porter* of the Board being prohibited from relying on a refusal to agree as the sole evidence of bad faith bargaining while being permitted to compel agreement in the same dispute has occurred. (See 397 U.S. at 108.) Burns' refusal to agree to the Wackenhut agreement is the only evidence the Board relied on in finding a separate violation of Sections 8(a)(5) and 8(d); and based on said refusal, the Board seeks to compel Burns to adopt, honor and enforce the Wackenhut agreement.

On the basis of the foregoing, it is clear that this Court should affirm the instant court of appeals decision to deny enforcement of the portion of the Board's order that required Burns to adopt, honor and enforce the Wackenhut agreement.**

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*[*T*]*he unfair labor practices under the purview of this bill are strictly limited to those enumerated in section 8.* This is made clear by paragraph 8 of section 2, which provides that 'The term "unfair labor practice" means any unfair labor practice listed in Section 8. . . .'" Senate Report No. 573 On S. 1958, 2 Legis. Hist. NLRA 2300 at 2308. (Emphasis added.)

**Cases upholding the Board's power to order an employer to execute an agreement negotiated on his behalf by an agent, an *alter ego,* or a multi-employer association, are inapposite. See, *e.g., Retail Clerks v. NLRB,* 373 F.2d 655 (D.C. Cir. 1967); *Oilfield Maintenance Co.,* 142 N.L.R.B. 1384 (1963). In these cases, the employer consented to be bound to the agreement, and all that remained was the formal execution of an agreement. The Board's Counsel argues that Burns had knowledge of the Wackenhut agreement when it bid for the Lockheed service contract. (Board Brief, p. 28.) However knowledge of the Wackenhut agreement could only have put Burns on notice that under *Wiley* it might in the future be required to arbitrate grievances arising under the Wackenhut agreement. While Burns accepted this risk, it never consented to be bound by the Wackenhut agreement, and rejected the UPGWA demand that it be bound thereby. Indeed, when Burns first became aware of the Wackenhut agreement, the law as expressed in *Rohlik, Inc.,* 145 N.L.R.B. 1236

B. Wiley Does Not Support a Holding That Burns Violated Sections 8(a)(5) and 8(d) by Refusing to Adopt, Honor and Enforce the Wackenhut Agreement.

Wiley was an action under Section 301 to compel arbitration concerning certain employee rights which had allegedly "vested." It was not an unfair labor practice case involving Sections 8(a)(5) and 8(d). In *Wiley*, the question before the Court relevant hereto was:

> ". . . [W]hether a corporate employer must arbitrate with a union under a bargaining agreement between the union and another corporation which has merged with the employer. . . ." 376 U.S. at 544.*

The Court held that:

> ". . . [T]he disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not

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(1964), clearly was that a successor was not bound, as a matter of law, by its predecessor's collective bargaining agreement. *NLRB v. Strong*, 393 U.S. 357 (1969); *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967); *Smith v. Evening News Ass'n.*, 371 U.S. 195 (1962); and *NLRB v. Huttig Sash & Door Co.*, 377 F.2d 964 (8th Cir. 1967), are inapposite. Such cases involved the Board's power under Section 10 of the Act to remedy a conventional unfair labor practice. *NLRB v. C & C Plywood Corp.*, and *NLRB v. Huttig Sash & Door Co.*, (unilateral changes in wage rates); *NLRB v. Strong* (refusal to execute an agreement negotiated by a multi-employer association in the absence of a timely withdrawal); *Smith v. Evening News Ass'n.*, (discriminatory discharge). In each case there was a valid and binding collective bargaining agreement to which the employer or its authorized agent had agreed. Further, the provision of Section 8(d) which forbids termination or modification of a contract without proper notice is not relevant because the application of this provision presupposes that Burns was bound by the Wackenhut agreement—the very question before this Court.

*The other question before the Court concerned procedural arbitrability.

> automatically terminate all rights of the employees covered by the agreement, and that, *in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement.*" (Id. at 548.) (Emphasis added.)

The decision in *Wiley* to require a successor employer to arbitrate under its predecessor's collective bargaining agreement was based entirely upon the policy of utilizing arbitration as the favored means for resolving industrial disputes. This policy lies at the core of the federal law that has been developed by this Court under Section 301. *Wiley* is an integral part of the line of cases decided under Section 301, which evolved from *Textile Workers v. Lincoln Mills, Inc.*, 353 U.S. 448 (1957). In *Textile Workers v. Lincoln Mills Inc.*, the Court noted that Section 301 provided a mandate for the federal courts to fashion a body of common law governing the enforcement of collective bargaining agreements, and held that the agreement to arbitrate contained in a collective bargaining agreement was specifically enforceable in federal courts. Thereafter, the Court, in the Steelworkers Trilogy,* held that disputes involving collective bargaining agreements will be referred to arbitration whenever there is any reasonable basis for so doing. *Wiley* involved the application, to cases involving changes in ownership, of the doctrine requiring the resolution of disputes through arbitration whenever there is a reasonable basis for so doing. Indeed, in *Wiley*, the Court, citing *Steelworkers v. War-*

Steelworkers v. Enterprise Wheel & Car. Corp., 363 U.S. 593 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960).

rior & Gulf Navigation Co., 363 U.S. 574, 582-583 (1960), analogized its holding to:

> ". . . [T]he principle that when a contract is scrutinized for evidence of an intention to arbitrate a particular kind of dispute, *national labor policy* requires, within reason, that 'an interpretation that covers the asserted dispute,' . . . be favored." 376 U.S. at 550, n. 4. (Emphasis the Court's.)

The court of appeals below correctly noted that the policy basis upon which *Wiley* was decided made it inapposite to a determination of the issues presented herein under Sections 8(a)(5) and 8(d). (Appendix, pp. 191-192.) However, the Board attempted to utilize the rationale of *Wiley* and the other arbitration cases decided under Section 301 to circumvent the prohibition of Section 8(d) and the legislative history of the Act against ordering a non-consenting party to accept a collective bargaining agreement to which it did not agree. (See pp. 24-32, *supra*.) The Board stated:

> "Nor can a holding that Burns is obligated to honor and adhere to the express terms of the contract readily be equated with compelling Burns to agree to a bargaining proposal or make a concession it is unwilling to make. Indisputably, there is a contract. That contract covers the employees of the employing industry which Burns took over; it was negotiated on behalf of the employing enterprise by Wackenhut, Burns predecessor. *That contract is reasonably related to Burns through its takeover of Wackenhut's Lockheed service functions and its hiring of Wackenhut employees.*" (Appendix p. 10.) (Emphasis added.)

The Board's language was obviously based upon the following statement in *Wiley:*

> ". . . [A]lthough *the duty to arbitrate,* as we have said . . . must be founded on a contract, *the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed.* This case cannot readily be assimilated to the category of those in which there is no contract whatever, or none which is reasonably related to the party sought to be obligated." 376 U.S. at 550. (Emphasis added.)

It is clear that the cases referred to in *Wiley* as those involving "no contract whatever" or no contract "reasonably related to the party sought to be obligated," were cases arising under Section 301 concerning the duty to arbitrate. The Court clearly was not referring to cases arising under the unfair labor practice portions of the Act where Section 8(d) and clear legislative history against the imposition of collective bargaining agreements applies. Indeed, all of the relevant cases cited by the Court in *Wiley* with respect to the issue of a successor's duty to arbitrate arose under Section 301.*

The Court in *Wiley* referred to unfair labor practice cases involving the duty of a successor employer to bargain with its predecessor's union,** and specifically stated that it:

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*The Court relied on *Textile Workers v. Lincoln Mills, Inc., supra,* and the Steelworkers' Trilogy.

**See 376 U.S. at 551, where the Court cited *NLRB v. McFarland,* 306 F.2d 219 (10th Cir. 1962), *NLRB v. Aluminum Tubular Corp.,* 299 F.2d 595 (2d Cir. 1962), and *Cruse Motors, Inc.,* 105 N.L.R.B. 242 (1953). The Court also cited *L. B. Spear & Co.,* 106 N.L.R.B. 687 (1953), and noted that *Wiley* did not concern the problem where there was more

"[did] not suggest any view of the questions surrounding a certified union's claim to continued representative status following a change in ownership." (376 U.S. at 551.)

Therefore, it is clear that neither the doctrine nor the policy of the unfair labor practice portions of the Act played any part in this Court's decision in *Wiley*. It is significant that the Court in *Wiley*, though urged to hold that a successor employer was bound by its predecessor's entire collective bargaining agreement, refrained from so holding. (See, Brief of American Federation of Labor and Congress of Industrial Organizations as amicus curiae at 8-22, *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964).)* Since *Wiley* was de-

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than one union. Finally, the Court cited *Retail Clerks v. Lion Dry Goods, Inc.*, 369 U.S. 17 (1962) for the proposition that the union in *Wiley* could represent the employees covered by the agreement out of which the duty to arbitrate arose. The petitioner in *Wiley* had argued that since it was not a party to an agreement to arbitrate, and had not assumed obligations thereunder, it could not be ordered to arbitrate. (376 U.S. at 547; see also, Brief of Petitioner at 23-30, *Wiley*.) The briefs of the petitioner in *Wiley* did not cite either the bar of Section 8(d) or the legislative history against imposing agreements upon nonconsenting parties, or cases decided thereunder, to support its argument on this point. (See Brief and Reply Brief of Petitioner, *Wiley*.)

*In *Wiley*, the AFL-CIO, in its Brief, had argued before this Court as follows:

"We take, first, the simplest case in which the question in this case can arise. Does the mere fact of a change in ownership of a business enterprise terminate a collective bargaining agreement? Management and union have, through the process of bargaining, hammered out a set of rules which will govern employment for, say, 2 years. Shortly thereafter the business is sold—lock, stock and barrel. The new owner takes over everything—the physical plant, the contracts with customers, the trade name, the accounts receivable, the good will. He is carrying on the same business in the same way at the same stand. But, he specifies, he is not assuming the collective bargaining agreement.

(This footnote is continued on next page)

cided pursuant to Section 301 under a broad Congressional mandate to fashion a body of federal common law concerning collective bargaining agreements, if the rule of contract survival sought by the Board herein were proper, the Court would have so ruled in *Wiley*.

In spite of the foregoing, the Board's Counsel argues that inherent in the *Wiley* decision is the proposition that a collective bargaining agreement survives a change in ownership. (Board Brief, p. 25.) The Board and the Board's Counsel have failed to recognize that the Court in *Wiley* left it entirely to the arbitrator to decide all questions regarding contract survival; and that it is for the arbitrator to decide whether all or any part of a collective bargaining agreement applies to a successor employer. Indeed, after the *Wiley* dis-

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"What, under these circumstances, is the status of that agreement? Conventional contract principles would assert that it has terminated, at least insofar as it pertains to the plant that has been sold . . . Of course, if the transfer of ownership is accomplished by sale of the stock of the contracting company—as is often the case—the result would be different . . . .

"It is our view that these results, indicated by conventional contract law, are nonsense in terms of the law to which reference should properly be made—the federal labor law. It is our contention that the collective bargaining agreement should be regarded as continuing to regulate the industrial community for which it was designed so long as that community continues in existence, irrespective of any change in ownership.

"It might, at first glance, appear radical to urge that a purchaser is bound by a collective bargaining agreement to which he never consented. Upon reflection, however, it becomes apparent that a collective bargaining agreement is not a consensual arrangement in the way that other agreements are . . .

"It is, we believe, no more radical to hold that a purchaser of a business is bound by the agreement than it is to hold that subsequently hired employees are bound by it. . . ." (Brief of American Federation of Labor and Congress of Industrial Organizations, as *Amicus Curiae* at 8-10, *John Wiley & Sons, Inc. v. Livingston, supra.*)

pute was referred to arbitration, an arbitrator held that the contract did not survive the merger. See *Interscience Encyclopedia, Inc.*, 55 LA 210 (Roberts, 1970).

The Board has failed to recognize that when a court is functioning under Section 301, there are no statutory limitations on its power such as those contained under Section 8(d) and the legislative history of the Act. To the contrary, under Section 301, courts have a mandate to shape and make the law. The interaction between Section 301 and other portions of the Act was considered by this Court in *NLRB v. Strong*, 393 U.S. 357 (1969), where it was made clear that all of the principles developed under Section 301 are not applicable to unfair labor practice cases. In *Strong*, the employer, who was a member of a multi-employer association and had not withdrawn in a timely fashion, refused to sign the agreement, which contained a provision for binding arbitration, that had been negotiated by the association. The Board ordered the employer to sign the agreement and pay the fringe benefits that were due thereunder. The employer argued that the order to pay fringe benefits was not enforceable because the Board, like a court, was required to defer to arbitration questions of contract application. The employer contended that an arbitrator—and not the Board—must determine whether fringe benefits were owed the employees under the agreement. This Court held that the principles developed under Section 301, requiring a court to defer to arbitration, did not apply to the Board in an unfair labor practice case because of the express powers granted to the Board under Sections 10(a) and 10(c) of the Act. Similarly, in the instant case, the principles developed under Section 301 and enunciated in *Wiley* do not apply to the Board—and

obviously may not be expanded in an unfair labor practice case in view of Section 8(d) and the legislative history of the Act.

On the basis of the foregoing, it is clear that the court of appeals below was correct in rejecting the Board's contention that *Wiley* supported its holding herein.*

C. Imposing a Collective Bargaining Agreement Upon a Non-Consenting Party Will Cause Serious Inequities Upon Employees, Unions and Employers.

Even if it is assumed *arguendo* that Burns was Wackenhut's successor, the court of appeals' decision, together with existing law, has fully effectuated the policies of the Act by requiring Burns to recognize and bargain with UPGWA as the exclusive representative

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*Other courts of appeal have noted that the holding in *Wiley* is limited to requiring a successor employer in an action under Section 301 to arbitrate grievances under its predecessor's agreement. *Bath Iron Works Corp. v. Draftsmen's Ass'n*, 393 F.2d 407, 410 n. 3 (1st Cir. 1968); *Monroe Sander Corp. v. Livingston*, 377 F.2d 6, 11 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967); *Teamsters Local 568 v. Red Ball Motor Freight, Inc.*, 374 F.2d 932, 939-40 (5th Cir. 1967); *McGuire v. Humble Oil & Refining Co.*, 355 F.2d 352 (2d Cir.), *cert. denied*, 384 U.S. 988 (1966); *United Steelworkers v. Reliance Universal Inc.*, 335 F.2d 891, 895 (3d Cir. 1964); *Retail Store Employees Local 954 v. Lanes of Findlay, Inc.*, 260 F.Supp. 655 (N.D. Ohio 1966). *Wackenhut Corp. v. United Plant Guard Workers*, 332 F.2d 954 (9th Cir. 1964) is not contrary. As in the cases cited above, the court in *Wackenhut* specifically held that a successor can be compelled to arbitrate under its predecessor's collective bargaining agreement but in dicta, the court stated that the contract was binding upon the successor. This same dictum appeared in *Teamsters Local 524 v. Billington*, 402 F.2d 510 (9th Cir. 1968), and was followed in *Pulp Workers v. Great Northwest Fibre Co.*, 263 F.Supp. 167 (E.D. Wash. 1965). *Cf. Joint Local Exec. Bd., Hotel Union v. Joden, Inc.*, 262 F.Supp. 390, 396 (D. Mass. 1966), and *In re Bethbowl Corp.*, 283 N.Y.S. 2d 258 (Sup. Ct. 1967).

of Facility guards.* Since the passage of the Act, the preservation and encouragement of collective bargaining and arbitration have been regarded as the most effective means of avoiding industrial strife. However, the Board has now held that these means are inadequate and that the forced imposition of a collective bargaining agreement is needed to preserve industrial peace in cases involving changes in employers. The imposition of a collective bargaining agreement upon a non-consenting party will not insure that there will not be a strike or a lockout. There still could be a strike or a lockout in breach of contract, and judicial remedies therefore have not always been successful. Forcing a collective bargaining agreement upon a non-consenting union or employer could create an unhealthy working environment that would be worse than a strike. Even if imposition of a collective bargaining agreement could prevent resort to economic action, such imposition is in direct violation of the intention of Congress in Section 8(d) of the Act, which clearly permits parties to freely negotiate utilizing whatever economic power they might

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*It is undisputed that a successor employer (a) is obligated to recognize and bargain with the union representing its predecessor's employees (see, *e.g., NLRB v. Auto Ventshade, Inc.*, 276 F.2d 303, 304 (5th Cir. 1960)); (b) must refrain from making unilateral changes in the terms and conditions of employment; (c) must give the union notice of any proposed change in the terms and conditions of employment; and (d) must bargain about such change if requested to do so by the union. (See, *e.g., Overnite Transportation Co.*, 157 N.L.R.B. 1185 (1966)), enforced, 372 F.2d 765 (4th Cir.), cert. denied, 389 U.S. 838 (1967). It has also been established that a successor employer must, under certain circumstances, remedy the unfair labor practices of its predecessor. (See, *e.g., Southport Petroleum Co. v. NLRB*, 315 U.S. 100 (1942).) Further, under *Wiley*, had UPGWA so requested, Burns would have been required to submit disputes concerning employee rights under the Wackenhut agreement to arbitration.

possess.* While industrial peace might have been preserved in *H. K. Porter* by upholding the Board's order, even though there was a flagrant violation of the Act, the Court refused to force agreement. Without Congressional action repealing Section 8(d) and overruling *H. K. Porter,* the Board's rule of contract survival cannot be enforced.

In *Kota Division of Dura Corp.*, 182 N.L.R.B. No. 51, 74 L.R.R.M. 1104 (1970), the Board held that a union remains bound by a collective bargaining agreement even after a change of employer.** Forcing acceptance of a collective bargaining agreement upon a non-consenting union or employer will foster rather than prevent industrial strife. The court of appeals below recognized that a change of employers may make it inequitable to force a union's continued compliance with a collective bargaining agreement that was negotiated under different circumstances and with a different employer. The court stated:

> "Although it is true that a rule such as that promulgated by the Board would put future po-

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*See *NLRB v. Insurance Agents'*, 361 U.S. 477 (1960). The right of employees to strike and to engage in concerted activities is fully protected by Section 7 of the Act [*NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962)]; as is the right of employers to form multi-employer associations to pool strength and lockout. *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Brown*, 380 U.S. 278 (1965); *NLRB v. Truck Drivers*, 353 U.S. 87 (1957) (Buffalo Linen case).

**In *Kota Division of Dura Corp.*, the only information the union received regarding the possibility of the sale of the business was a memorandum sent to it by the employer at the time that there were tentative negotiations concerning the sale of the business. Thereafter, the union received notice that the sale had been consummated and that the new owner had assumed all obligations of the predecessor, which included the labor agreement in question. The union then insisted on negotiating a new agreement. (See Trial Examiner's decision in *Kota Division of Dura Corporation, supra.*)

tential successor employers on notice that existing contracts would be obligatory on them and thus provide them with a choice of action, the rule would bind the union to a contract with a successor employer without giving it any opportunity for choice. This could sometimes result in serious inequities. For example, where a union made substantial concessions to a failing employer in order to keep him in business and then discovered that the successor was a strong, financially viable organization, it would have no chance to bargain anew." (Appendix, p. 192.)

Serious inequities upon employers may also be caused under the Board's rule. Where a predecessor's poor business ability or economic position necessitates a transfer, a successor is often motivated by the belief that different policies will yield profitable results. If a successor is bound by the collective bargaining agreement which contributed to the predecessor's economic problems, transfer will be discouraged. The alternative to transfer often is for the predecessor to go out of business, with attendant dislocations of employees and possible industrial strife. See Banta, *Labor Obligations of Successor Employers,* 36 Geo. Wash. L. Rev. 215 (1967). In some cases an acquiring employer or a successful bidder may be motivated to make lawful changes in corporate structure, employee functions, work location, employee environment and the composition of the work force in order to avoid being a successor. See, e.g., *Federal Electric Corp.,* 167 N.L.R.B. 469 (1967); *Apex Record Corp.,* 162 N.L.R.B. 333 (1966). Clearly, a rule which makes the consequences of becoming a successor employer more onerous and encourages drastic changes in the employing

industry will ultimately be contrary to the employee interests which the Board is constituted to protect.

The Board argues that the harmful aspects of its decision may be avoided because in "unusual circumstances," it will not apply the rule of contract survival. The court of appeals rejected this contention, correctly noting that:

> "The Board's holding that it will consider 'unusual circumstances' (see, e.g., *Emerald Maintenance, Inc.*, 188 N.L.R.B. No. 139 (1971) where the Board, citing 'unusual circumstances,' refused to apply the rule it had earlier laid down in *Burns*) is no answer since it merely arrogates to the Board the additional power to pick and choose among the contractual provisions it will impose on non-contracting parties." (Appendix p. 192.)

There are additional reasons to affirm the court of appeals' decision on the contract issue. Burns obtained its Facility subcontract on the basis of competitive bidding. The Wackenhut agreement, which had a three year term, was consummated approximately sixty days before Wackenhut's subcontract with Lockheed was scheduled to expire, and during the time that Lockheed was obtaining competitive bids from other plant protection subcontractors. (See Appendix, pp. 126, 127, 150.) Under almost identical circumstances, the Board has held that its rule of contract survival should not apply. *Emerald Maintenance, Inc.*, 188 N.L.R.B. No. 139, 76 L.R.R.M. 1437 (1970).

In *Emerald Maintenance, Inc., supra*, the United States Air Force awarded Emerald a contract to provide maintenance at Laredo Air Force Base. The contract between the Air Force and Emerald was consum-

mated pursuant to the Service Contract Act of 1965, 41 U.S.C. Sections 351-357, which required that the contract be awarded to the low bidder, on the basis of competitive bidding without negotiations. At the time Emerald bid, the previous contractors' employees were represented by a union and were covered by a collective bargaining agreement which expired six months after the expiration date of the contract between the previous contractor and the Air Force. The collective bargaining agreement contained a substantial increase in employee benefits which was to commence upon the expiration date of the agreement with the Air Force and the previous contractor. Apparently the union and the previous contractor had hoped that the Department of Labor would consider the prospective increases when establishing the prevailing area wage which prospective bidders were expected to pay. If this had occurred the cost of the increased benefits would have been absorbed by the Air Force, and would have been taken into account as a cost item by bidders. However, when the Air Force solicited bids it specified as the prevailing area wage the rates paid under the collective bargaining agreement prior to the effective date of the increases. Emerald, in bidding, did not take the increases into account.

In holding that Emerald was not bound by its predecessor's collective bargaining agreement, the Board stated:

> ". . . [A] mechanistic application of *Burns* under the circumstances here would retard, rather than advance, that goal. These Federal service contracts are not subject to refinement through negotiation. Thus, the contracting parties have no device through which they can by agreement allocate be-

tween themselves the sudden cost changes resulting from changed employment terms. We perceive that Respondent as successful bidder for such a service contract could be expected to have only three options if compelled to abide by its predecessor's contracts: it might abandon the service contracts, forcing the Air Force to perform the services with its own employees; it might refrain, without regard to considerations of lawfulness, from employing the work force of the predecessors, or, it might fulfill its contractual obligations to the Air Force and its predecessors' obligations to the Union, thereby jeopardizing its economic viability and the jobs of its employees. It does not serve the purposes of *Burns* to confront an employer and its employees with such alternatives . . . *This case suggests the hazards of enforcing the contracts of one employer against a successor where annual rebidding normally produces annual changes in contractor identity. These circumstances might encourage less arm's length collective bargaining whenever the employer had reason to expect that it would not be awarded the next succeeding annual service contract.*" (188 N.L.R.B. at ...., 76 L.R.R.M. at 1438-1439.) (Emphasis added.)

Many of the same reasons for not forcing Emerald to accept the agreement apply herein, even though the agreements between Lockheed and Burns, and Lockheed and Wackenhut, were not covered by the Service Contract Act. In *Emerald Maintenance, Inc.*, the Government had made a decision that it did not want to absorb the prospective cost increases provided in the previous contractor's collective bargaining agreement. In the instant case, in all probability, the cost Lock-

heed incurred under the plant protection sub-contract were ultimately paid by the Government. There is no reason to assume that the Government would desire that the increased costs in a collective bargaining agreement between one of its prime-contractors, Lockheed, and a plant protection sub-contractor be applied to a different sub-contractor. Further, even though the sub-contracts between Lockheed and Wackenhut were for terms of one year (Appendix, pp. 128, 129-130), the Wackenhut agreement was for a three year term. As in *Emerald Maintenance, Inc.*, "the hazards of enforcing the contracts of one employer against a successor where annual rebidding normally produces annual changes in contractor identity" are present. Indeed, in the plant protection industry, there are frequent changes of contractors. It is quite possible that Wackenhut, realizing that it could lose its contract with Lockheed, negotiated a three year agreement in order to make it more difficult for other subcontractors to obtain the Facility job from Lockheed. As in *Emerald Maintenance, Inc.*, the rule of contract survival in the instant case will tend to discourage arms length bargaining.

As has been noted above, the Board's reliance on *Wiley* was incorrect. Indeed, rather than supporting the Board's position, *Wiley* supports the contentions herein. In *Wiley*, the Court reaffirmed its faith in the arbitral process and in an arbitrator's ability to resolve industrial relations problems created at the time of a change in ownership of an enterprise. (See 376 U.S. at 551, n. 5; see also *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960). As the Steelworkers' Trilogy indicates,

courts are bound to defer to arbitration whenever arbitration has been provided in the agreement. It is submitted that this policy also applies to the Board, insofar as requiring that all questions concerning the survival of a collective bargaining agreement after a change of employers must be resolved by arbitration.*

In *Wiley*, the Court said:

> "The preference of national labor policy for arbitration as a substitute for tests of strength between contending forces could be overcome only if other considerations compellingly so demanded." (376 U.S. at 549-550.)

There are no countervailing considerations in the instant case which overcome the preference of national labor policy for arbitration. Indeed, in the instant case there are compelling considerations which favor requiring arbitration rather than imposing a contract upon a non-consenting party.

In *Collyer Insulated Wire*, 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931 (1971), an employer was charged with violating Sections 8(a)(1) and (5) of the Act by making unilateral changes in wages and other terms and conditions of employment. The employer argued that the changes made were authorized by its collective bargaining agreement. The employer urged that the dispute should be resolved by an arbitrator, under the grievance and arbitration provisions of the agreement, and not by the Board. The Board, by a three to two margin, decided, as a matter of policy, to dismiss the unfair labor practice complaint so that the dispute could

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*See *NLRB v. Strong*, 393 U.S. 357 (1969). (Douglas, J., dissenting opinion).

be resolved through the grievance and arbitration provisions of the collective bargaining agreement.*

The Board in *Collyer Insulated Wire* noted that it was not required as a matter of law to defer to arbitration.** However, citing *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 271 (1964), the Board found that deferral would best serve the purposes of the Act because:

> "In our view, disputes such as these can better be resolved by arbitrators with special skill and experience in deciding matters arising under established bargaining relationships than by the application by this Board of a particular provision of our statute. The necessity for such special skill and expertise is apparent upon examination of the issues arsing from Respondent's actions with respect to the operators' rates, the skill factor increase, and the reassignment of duties relating to the worm gear removal. Those issues include, specifically: (a) the extent to which these actions were intended to be reserved to the management, subject to later adjustment by grievance and arbitration; (b) the extent to which the skill factor increase should properly be construed, under article IX of the agreement, as a 'change in the general scale of pay' or, conversely, as 'adjustments in individual rates . . . to remove inequalities or

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*The Board's majority consisted of Chairman Miller, and Members Kennedy and Brown. Member Brown wrote a separate concurring opinion. Board Members Jenkins and Fanning wrote separate dissenting opinions.

**In contrast to *Collyer Insulated Wire*, the instant case falls under the policy of Section 8(d) which prohibits the Board from ordering Burns to accept the Wackenhut agreement.

for other proper reason'; (c) the extent, if any, to which the procedures of article XIII governing new or changed jobs and job rates should have been made applicable to the skill factor increase here . . . The determination of these issues, we think, is best left to discussions in the grievance procedure by the parties . . . or, if such discussions do not resolve them, then to an arbitrator chosen under the agreement and authorized by it to resolve such issues."

The Board's recognition in *Collyer* that it has no specific expertise in the application and interpretation of collective bargaining agreements is significant.* Congress did not intend to confer jurisdiction on the Board to enforce collective bargaining agreements. Instead, it intended that actions concerning collective bargaining agreements be handled according to the usual processes of law, i.e., arbitration or suits under Section 301. The complex contractural problems caused by changes of ownership call for the expertise, speed and flexibility of arbitration. See, generally, Dunau, *Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems,* 57 Colum. L. Rev. 52 (1957). An arbitrator is particularly well suited to consider whether the collective bargaining agreement and practice thereunder

*In *Sinclair Refining Co. v. NLRB,* 306 F.2d 569, 577 (5th Cir. 1962), the court stated: "While Congress has, of course, presumably infused an expertise in the members of the Labor Board with respect to matters committed to its jurisdiction, Garner v. Teamsters, Chauffers and Helpers Local Union, 1953, 346 U.S. 485, 490 . . . it has 'expressly rejected that policy with respect to violations of collective bargaining agreements * * *.' Charles Dowd Box Co., Inc. v. Courtney, 1962, 368 U.S. 502. . . . Those controversies are left 'to the usual processes of the law.' The processes of the law are, of course, either traditional court action or the grievance machinery where established."

of one employer should be applied to another. The court in *Steelworkers v. Reliance Universal, Inc.*, 335 F.2d 891, 895 (3d Cir. 1964), aptly noted:

> ". . . [*N*]*ew circumstances created by the acquisition of a business by a new owner may make it unreasonable or inequitable to require labor or management to adhere to particular terms of a collective bargaining agreement previously negotiated by a different party in different circumstances.* Although the pre-existing labor contract indicates the structure of labor relations and the established practice of the shop at the beginning of the new proprietorship, an arbitrator of a subsequent complaint charging unwarranted departure from that scheme may properly consider any relevant new circumstances arising out of the change of ownership, as well as the provisions of and practices under the old contract, in achieving a just and equitable settlement of the grievance at hand." (Emphasis added.)

The harmful effects of the Board's rule are easily avoided by enforcing only the legal obligations which obtained as to successors, both employers and unions, prior to the rule announced by the Board in the instant case. The parties would thereby be free to negotiate for any protection either deems appropriate—and resolve any problems through the process of collective bargaining, including arbitration where there is an agreement containing an arbitration clause.

On the basis of the foregoing, it is clear that the court of appeals refusal to enforce that portion of the Board's order which requires Burns to adopt, honor and enforce the Wachkenhut agreement fully comports with the Act.

Conclusion.

This Court should reverse that portion of the court of appeals' judgment ordering Burns to recognize and bargain with UPGWA as the exclusive representative of Burns Facility guards. However, if the Court affirms such part of the court of appeals' judgment, it should also affirm that portion of the court of appeals' judgment wherein it refused to enforce the Board's order that Burns adopt, honor and enforce the Wackenhut agreement.

Respectfully submitted,

CHARLES G. BAKALY, JR.,
SEYMOUR SWERDLOW,
Attorneys for Burns International Security Services, Inc.

Of Counsel:
O'MELVENY & MYERS,
KATHLEEN PERATIS.

Dated: December 30, 1971.

APPENDIX A.

[Tr. p. 1.]

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
Thirty-First Region

Case No. 31-CA-776

In The Matter of
The William J. Burns International Detective Agency, Inc., Respondent
and
International Union, United Plant Guard Workers of America and Its Amalgamated Local Union No. 162, Charging Party,
and
American Federation of Guards, Local 1, Party in Interest

Hearing Room #1
215 West Seventh St., 9th Floor,
Los Angeles, California
December 19, 1967

The above-entitled matter came on for hearing, pursuant to notice, at 10:30 o'clock, a.m.

BEFORE: E. Don Wilson, Esq., Trial Examiner.

APPEARANCES:

Gerald Goldman, Esq., Clifford L. Hardy, Esq., 215 West 7th St., Los Angeles, California, appearing on behalf of the General Counsel.

Livingston, Gregory, Van Lopik & Higle, By: Gordon A. Gregory, Esq., 2140-2144 First National Bldg., Detroit, Michigan, appearing on behalf of the Charging Party.

O'Melveny & Myers, By: Charles G. Bakaly, Jr., Esq., and Seymour Swerdlow, Esq., 433 S. Spring Street, Los Angeles, California, appearing on behalf of the Respondent.

[Tr. p. 3] PROCEEDINGS

[Tr. p. 108.] ARTHUR C. POTTER

was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Swerdlow) Would you please state your name and address.

A. Arthur C. Potter, 1880 Los Robles, San Marino.

Q. Mr. Potter, could you state who your employer is?

A. I am Director of West Coast Operations and Area Manager for Los Angeles for the Wackenhut Corporation.

Q. Are you familiar with the operations of the Wackenhut Company in the Los Angeles and let's say Southern California area?

A. I am.

Q. Are you familiar with those operations as they were in 1967 prior to June 1?

A. Yes, sir, I am.

[Tr. p. 109.]

Q. Now, approximately how many employees did Wackenhut Company—well, before we get into that, you were in your present job when the United Plant Guard Workers Union got the union organized and campaigned at Lockheed?

A. Yes, sir.

Q. And you are familiar with the operations of Wackenhut Company as they were in Southern California at that time?

A. I am.

Q. Now, the questions that I am going to ask you, relate to the time that the union petitioned for election, the early part of 1967—

[Tr. p. 110.]

MR. GREGORY: May I make the further objection, the evidence appears to be irrelevant and immaterial, that is as to the Wackenhut operation in the West Coast and specifically, Lockheed, we have already stipulated that.

TRIAL EXAMINER: That seems to me to be pretty much correct. But we have a situation here where we have got a certified unit as recognized for Lockheed employees as plant guards. You don't dispute that was the appropriate unit so far as Wackenhut was concerned?

MR. SWERDLOW: Well, that's just what I am going to dispute, and the reason I think I have the right to dispute it is because, that was the appropriateness of that unit is very relevant to this proceeding, if that was not an appropriate unit, certification was improper and UPGW would have no bargaining right. Now, Burns was not a party to certification, and it is entirely erroneous to find we are bound by proceedings we were not a party to, and our rights depend on it, and this is especially so when there was never any hearing on this.

[Tr. p. 113.]

Q. Can you tell me briefly what the organizational structure of the Wackenhut Company is, how you fit into it as the Director of West Coast Operations, who you report to, who they report to, how the division of the company is set up? Basically, I would like the kind of information that would appear in an organization chart.

A. The company is headed up by George Wackenhut as President, Corporate Headquarters at Coral Gables, Florida; Chief Vice-President John Ammerill; Vice-President in Charge of Operations; Vice-President in Charge of Development, and other corporate offices are all located at Coral Gables, [Tr. p. 114] Florida. Would you like me to name the others?

Q. No.

A. We have offices in various principal cities in the United States and including South America. I was designated Director of West Coast Operations sometime in June, 1966, and requested by Mr. Wackenhut to take charge of the operations in Los Angeles, given the position of Area Manager for Los Angeles Office.

Q. What territory was in your jurisdiction?

[Tr. p. 115.]

Q. (By Mr. Swerdlow) What about the State of California, is your jurisdiction over all jobs?

A. With the exception of Livermore, I am.

Q. I am talking about the time of certification; you are talking about February and March, 1967, at that time; all my questions are going to be related to that period, not your present operation. At that time, your office had jurisdiction over all the jobs in California?

A. All with the exception of one supervised out of our corporate headquarters.

Q. That's at Coral Gables?

A. That job was not in this area, but in the State of California.

Q. Does your office handle any jobs, states bordering in California?

A. Not if you are speaking of guard operations. I might supervise and occasionally investigate in some other state, not on guard jobs.

Q. All the guard operations are in California. Now, how many different jobs does Wackenhut Company have in the State of California that were under your jurisdiction at that time?

A. I couldn't say off hand; there are several hundred of them. I would have to look at the records.

[Tr. p. 117.]

Q. (By Mr. Swerdlow) I would like, to the best that you [Tr. p. 118] can give us, an estimate of the number of guard jobs that Wackenhut had at the time we are concerned with here, regardless of the number of guards on the job, and excluding investigations, investigating kind of jobs?

MR. GOLDMAN: I object. I think that's ambiguous. He is not defining the territory.

TRIAL EXAMINER: He is talking about the area under this witness' jurisdiction.

THE WITNESS: It would be a very rough estimate.

TRIAL EXAMINER: Well, give us a rough estimate.

THE WITNESS: I could only say two or three hundred.

Q. (By Mr. Swerdlow) All those jobs were supervised out of your office, the overall top level supervision?

A. Yes.

[Tr. p. 119.]

Q. Let's start with your office; who do you report to?

A. As far as operations are concerned, I report to the Vice-President in Charge of Operations in Coral Gables, Florida.

Q. Is this equivalent to midwest or southern director?

A. No, there is no other field operation, say title of Director, Midwest, and so forth, no, sir.

Q. You are the only one who has that title?

A. Yes, sir.

Q. You report to the Vice-President of Operations?

A. Vice-President in Charge of Operations, insofar as operations are concerned, yes, sir.

Q. Who else do you report to?

A. Might report directly to George Wackenhut or John Ammerill, the executive vice-president, on certain matters.

Q. Could you describe what your duties are?

A. General operational head for all matters concerning the Wackenhut Corporation in this area. As administrative head, in other words.

[Tr. p. 120.]

Q. How are wages, fringe benefits, determined for employees in the California area?

A. Those wages are set and approved by our corporate office in Coral Gables.

Q. Is it the same for all employees in the California area?

A. Yes, I might recommend subject to approval of the corporate office.

Q. This would include all employees?

A. Yes, sir.

Q. What about fringe benefits?

A. The same would apply, generally speaking.

Q. What I mean by fringe benefits, holidays?

A. Yes.

Q. Vacations, things of that nature; is that the same as wages?

A. Generally speaking, yes. I say generally speaking because, of course, we have our conferences and agreements and negotiations with our client and our final agreement and our final contract subject to approval by corporate headquarters at Coral Gables.

Q. I see, and before it's approved, you have to approve it?

A. Yes, sir.

Q. Now, where is the permanent records kept for employees in this state-wide, in the State of California?

A. 618 South Serrano Avenue, Los Angeles.

[Tr. p. 121.]

Q. Where are all payroll records kept?

A. Coral Gables, Florida.

Q. Now, do you have any employee manuals?

A. Yes, sir.

Q. Where was that manual prepared?

A. It was prepared—there are several manuals; they were all prepared basically at our corporate headquarters.

Q. I am only talking about guards, guard services?

A. Guard Manual, that was prepared at Coral Gables, Florida.

Q. Now, and all the questions I have asked, now, on fringe benefits, and so forth, relate only to guards in the State of California; when you answered, you understood that?

A. Yes, sir.

Q. Now, this employee manual, how is it used?

A. Well, it's given to each guard that is hired. He studies the manual and is given an examination on it.

Q. What sort of things are covered in the manual?

A. Duties of a guard, basic duties, general orders, you might say, special orders that might apply to a particular job.

Q. And do you have copies of that manual in your office?

A. Yes, sir.

Q. Now, the employees in California get the same or different manuals than employees in other states?

A. As far as their general manual is concerned, they get [Tr. p. 122] the same one.

Q. In the State of California, between the various jobs, the employees in one job get a different manual than employees in another job, in the guard job?

A. Not the guard manual, no.

Q. Now, on your jobs, how are they supervised—well, let me ask a different question: Underneath you is who?

A. As far as the guard operation is concerned, the next man is a manager of physical security.

Q. And what is there, only one manager of physical security?

A. Yes.

Q. And what is his jurisdiction?

A. The same as mine.

Q. Territorial, job-wise?

A. Yes. Los Angeles Office.

Q. What is his title?

A. Manager Physical Security.

[Tr. p. 123.]

Q. (By Mr. Swerdlow) You just told us that the man directly under you was manager of physical security?

A. Yes, sir.

Q. And his jurisdiction is the same as yours, area-wise and job-wise?

A. Generally speaking.

Q. And what are his duties?

A. He directly supervises the area supervisors and the facility supervisors of the various functions in the area.

[Tr. p. 128.]

Q. What is the line of supervision directly below him [the manager of physical security]?

A. Below him, you have a coordinator, scheduler, area supervisors and facility supervisors.

Q. Are they all in the Los Angeles office?

A. Not necessarily. They may occasionally come into the Los Angeles office, but from the standpoint of economy and overall operation, no.

Q. Now, you mentioned coordinator, area supervisor, and—

[Tr. p. 129.]

A. And facility supervisor.

Q. So that's the line of supervision directly below him?

A. Yes, sir.

Q. These three groups?

A. Yes, sir.

Q. Now, the coordinator, is that one person?

A. I believe that's true, possibly now could be classified as coordinator.

Q. How many area supervisors?

A. Eight, I believe.

Q. And how many facility supervisors?

A. It depends on the size of the facility whether any assigned to it or not.

Q. They are out in the field?

A. He is on a particular contract or job working in one particular plant. On the facility job.

Q. O.K. Now, first, where does the coordinator work?

A. The coordinator is in our headquarters building.

Q. Both of them are?

A. There is one at this time working down in our other, 6900 Hoover, our other building.

Q. You understand we are talking about the time of the election?

A. Well, you better cut that back to one coordinator, I think, at that time, and he was working out of Serrano Street [Tr. p. 130] address.

Q. Now, you may have forgotten, with respect to some of the questions we were talking about that period?

A. I think this is the only time I varied there, and this is the reason I have to be so indefinite as to the number of guard jobs that were in operation because the number of guard jobs varies from day to day.

Q. O.K. At the time this election proceeding was in progress, you had one coordinator who worked out of the L.A. office?

A. Yes, sir.

Q. What were his duties?

A. The area supervisors are not in the headquarters office very often; they are out covering that area. And the manager of physical security is also out of the office. So, the coordinator is there to coordinate the hiring of the personnel, payrolls, and other miscellaneous duties that affect the various areas.

Q. All the payroll checks are made out in Los Angeles office?

A. We make up the payroll, not necessarily all of them, no.

Q. The ones in Los Angeles?

A. No, they may be out in the facilities.

Q. Where are the checks issued from?

A. Corporate headquarters at Coral Gables, Florida.

[Tr. p. 131.]

Q. Now, with respect to some, the coordinator makes up the payroll?

A. No, not necessarily. He assists the area supervisors, in checking.

Q. All payrolls are turned over to him, is that the way it works?

A. Sometimes after the fact.

Q. After they are prepared?

A. In other words, it may not be practical, perhaps a payroll in Martinez, California, and sent it to Los Angeles, but he would get a copy following the preparation.

Q. They would send it directly to Coral Gables, also?

A. Yes, sir.

Q. But the payroll records and personnel records are in Los Angeles, is that right?

A. Yes, sir.

Q. Now, I am not really clear, when you say coordinate hiring and payrolls and things like that, are the actual—

A. He could have the title of supervisor but this distinguishes him from area supervisor; we call him coordinator.

Q. He is supervising the area supervisors?

A. To coordinate the activities of the area supervisors.

Q. And is he assigned the area supervision, does he assign the area supervisors jobs that they are supposed to work on?

[Tr. p. 132.]

A. No, the geographical covering of the area supervisors is set by the manager of physical security who himself gives these area supervisors their instructions as to what jobs they have to particularly stress and given most attention to, and so forth.

Q. And the coordinator, is his job keeping track of where an area supervisor is on different days?

A. Gives them assistance where needed, hiring men and training men, placing them on particular spots.

Q. Meaning guards?

A. Yes, sir.

Q. What do the area supervisors do?

A. Supervise the jobs and men in their particular area.

Q. Now, let me get back to the coordinator for one minute; is he in a policy making role?

A. No.

Q. Area supervisors; you had eight of them at the time of the election; what are their functions?

A. To supervise the guard jobs in the particular area.

Q. About how many jobs does each area supervisor supervise?

A. That varies a great deal depending upon the geographical covering of this area and the number of guard jobs in the area. He may have only four guard jobs in the area; he may have a dozen.

Q. And if he has four guard jobs, how does he divide his [Tr. p. 133] time?

A. Divides his time up wherever is most appropriate. Some jobs require a lot of his attention; some require very little.

Q. When you say he supervises the jobs, what does he actually do with regard to them?

A. He has to see positions covered on all three shifts, and if a man fails to show up because of illness or for any other reason, he gets hold of another man, gets him in there to cover that spot, sees that we fulfill our contract in that particular area.

Q. He checks to see if the company policy is being enforced?

A. Yes, sir, that is part of his responsibility.

Q. Now, these eight, they cover the California area?

A. Yes.

Q. About how many facility supervisors did you have at the time?

A. I wouldn't even approximate. It would generally fall into a definition category, as to what is a facility supervisor, generally only on larger jobs, might be on some other jobs, might be at the request of the client a lead guard or what-have-you. So, my guess, any guess I made would be a guess, not a statement, it would be very rough, I am afraid not more than one-quarter of our jobs, if that high, is facility supervised. I may be way high.

[Tr. p. 134.]

Q. Facility supervisor is the lowest level supervisor that the company, has, is that right?

A. Depends on the definition of a supervisor; the lowest level that we would, company wise, give him.

Q. The title of supervisor?

A. Yes. He may have the title of Sergeant, Captain, Lieutenant.

Q. Are there people below him who have the power to hire, fire?

A. No, a facility supervisor may not have the power to hire or fire, depending on the particular authority given him.

Q. What about the authority to make effective recommendations with regard to hiring and firing or other disciplinary matters?

A. I would say he would be most likely to have the authority to hire, most facility supervisors would have that responsibility, but he may not have the responsibility to fire. We want to hold that authority to the area supervisor.

Q. The facility supervisor is the lowest supervisor, speaking of authority to hire and fire, the facility supervisor is the lowest supervision of the company?

A. Yes.

Q. Now, with the area supervisors, do they hire employees, interview them and process?

[Tr. p. 135.]

A. Generally speaking, yes.

Q. That's what they do, do they discharge employees, fire them?

A. Yes, area supervisor may very well discharge or fire an employee.

Q. And with respect to all of the jobs under your jurisdiction, they do this, the area supervisors?

A. Yes, there may be an occasional exception where the facility would.

Q. He will delegate that?

A. Yes.

Q. Would that be frequent?

A. Rare.

[Tr. p. 137.]

Q. What type of job has the facility supervisors?

A. The larger jobs, generally speaking.

Q. How many employees constitute a larger job, over 40 or?

A. Not necessarily. It might be 20 or 25; it might be 40 or 45.

Q. What's the low mark?

A. I couldn't say there was a low mark because the particular client might want a facility supervisor, and we might recommend one because of the fact his operation is so small, he should have someone there on the job all the time to closely supervise the operation.

Q. Now, in regard to guards, do you interchange guards? [Tr. p 138.] I am talking about, again, everything I have been asking about relates to the time of this election?

A. There are some areas where you interchange quite a bit, and other areas very, very seldom.

Q. Let's take the Los Angeles County area?

A. I am speaking of the Los Angeles County area, I am saying within the Los Angeles County area, there are various areas where we interchange quite a bit and others where we don't because of geographic and clearance problems and other problems, and because of the fact that problems of working conditions and pay rates are such that we can't interchange, or because it wouldn't be economically feasible We may have a job setting so far from another job that it's not feasible to interchange.

[Tr. p. 144.]

Q. (By Mr. Swerdlow) Mr. Potter, is this the cover and the table of contents of the Wackenhut Guard Manual?

A. It is.

Q. And this is the manual that we discussed, that we have under consideration now?

A. Yes.

Q. And in the manual there are more detailed descriptions related to the matters covered in the table of contents?

A. Yes, sir.

Q. And all Wackenhut Guards are expected to follow the procedures related to these matters?

A. I would have no knowledge of whether all Wackenhut Guards are furnished exactly the same manual.

Q. Well, I am talking about your area?

A. In my area, California, and there is an exception in California, as I mentioned earlier, I have no specific knowledge of, and that is the job at Livermore, California.

Q. Other than the job at Livermore, California, all the other jobs, the manual is given to the guards and they are expected to follow it?

A. Yes, sir.

MR. SWERDLOW: May I offer this as Respondent's Exhibit No. 1. This is the only copy that I have.

TRIAL EXAMINER: You will have to duplicate it.

MR. SWERDLOW: O.K. Can I offer it?

[Tr p. 145.]

TRIAL EXAMINER: Of course you can. I'll give you time to have it duplicated.

Any objections to receipt of Respondent's Exhibit No. 1 for identification in evidence?

MR. GOLDMAN: No objection.

MR. GREGORY: No objection.

TRIAL EXAMINER: Without objection, it is received in evidence.

(The documents referred to were marked Respondent's Exhibit No. 1 for identification and received in evidence.)

Q. (By Mr. Swerdlow) Mr. Potter, when we left off yesterday, we were on the subject of interchange of guards among the jobs in California, and, again, we are talking about the time of the certification. Now, is this a practice in California to transfer guards from one job to another?

A. It's not a practice, if you mean by that a general practice. It is something you desire to avoid in the interest of economy and good management. There is some interchange necessary to take care of illnesses and other matters, resignations, normal turnover problems cause a certain amount of it.

Q. And what percentage of the employees would you estimate worked on more than one job the year immediately preceding [Tr. p. 146] certification?

A. Again I couldn't give any more than a very rough estimate that wouldn't qualify as an estimate but would be a guess. It would be a comparatively small percentage of the total, I would imagine.

TRIAL EXAMINER: Less than 1%?

THE WITNESS: I would say approximately 1% as an educated guess.

Q. Only 1% of the guards worked on more than one job in the last year in California?

A. To the best of my knowledge and belief.

Q. Now, when you get a new job, how do you staff that?

A. It is staffed, if possible, by selecting one or more men who are trained and experienced in our particular method of operation, new men are hired with appropriate background that live and reside in that particular area.

Q. When you select the men that are already trained in your operation, they are already employed by Wackenhut?

A. Generally speaking, yes.

Q. You transfer them to the new job to start the initial crew, is that right?

A. In some instances, yes; not in every instance.

Q. It would be in most instances?

A. I wouldn't know.

Q. Who would be the person who would know that?

[Tr. p. 147.]

A. I don't know whether my manager of security would be able to answer that question more specifically than I can or not. Possibly he could. He may not have it within his personal knowledge, either. He might have to do some research before he could answer that question.

Q. Would there be someone below the manager of security who would know?

A. No, sir.

Q. This information is in the company records?

A. It should be available, yes.

Q. When did Wackenhut first get the Lockheed job?

A. The Lockheed job was one of the jobs already in existence when the Wackenhut Corporation purchased the General Plant Protection Company in 1962. [Tr. p. 152.]

Q. How often do you have meetings with the areas supervisors?

A. No set schedule, possibly once a month.

Q. Where would the meetings take place?

A. Generally held in our headquarters office at 618 South Serrano, all areas supervised, may not include those areas located some distance away.

Q. What about facility supervisors, would they attend these meetings?

A. Generally speaking, no.

Q. Do you have separate meetings for facility supervisors?

A. I wouldn't say we do.

[Tr. p. 153.]

Q. What is the subject that you discuss in the meetings of the area supervisors, the broad general category?

A. The various problems that arise in connection with their job, problems that arise in connection with the training and the training of men, proper preparation of payrolls, various operational problems in connection with the job these men are carrying out.

Q. And I gather you are generally in attendance at these meetings?

A. No, I am not.

Q. Who generally conducts these meetings?

A. The manager of physical security.

Q. Now let's talk about the Lockheed job again. How many employees of Wackenhut have hired on at Lockheed again, talking about the period just at the time of the election?

A. There was fluctuation on this job as in any other job because of our need to have men on stand-by and part-time basis to fulfill the requirements of Lockheed Aircraft Service.

Q. What's the range that you fluctuate?

A. I would say somewhere in the neighborhood of 42 men and the supervisors.

Q. And supervisors?

A. 43 including the supervisors.

Q. One supervisor and 42 guards; I am not trying to confuse, I just didn't understand.

[Tr. p. 154.]

There was a supervisor on the Lockheed job?

A. Yes.

Q. I see, and who was that supervisor?

MR. McCANDLESS: Object to that; I don't think that's relevant.

TRIAL EXAMINER: Overruled.

THE WITNESS: Russell Frazier.

Q. (By Mr. Swerdlow) And when Wackenhut ceased to perform guard services at that facility, Lockheed facility, did Frazier remain as a Burns' employee?

A. No, he did not.

Q. Now, were there sergeants below Frazier on the job?

A. Yes, sir.

Q. And did they vote in the election that took place that the Board conducted in February?

A. I don't know who voted in the election.

Q. Now, the employees at Lockheed, now, were any of them transferred from other jobs Wackenhut had?

A. Some of them may have been. I cite as an example, that in view of the security clearance require-

ment, a man could not always be put immediately on that job until his clearance came through. Generally, that man would be assigned to a facility no longer in operation by Wackenhut Corporation—moved to another area, that was immediately west of Lockheed—and would be placed in that particular position not requiring [Tr. p. 155] clearance temporarily until his clearance came through, and then assigned to Lockheed facility.

Q. How many people were assigned in that manner in the year that immediately preceded the election?

A. I have no idea.

Q. Who would have that information?

A. That would be in our company's record.

Q. Now, Captain Frazier was at the job for the entire year preceding the election?

A. Yes, sir.

Q. Did he work for General Plant Protection before Wackenhut?

A. Yes, he did.

Q. Were any people transferred from the Lockheed job the year immediately preceding the election to other Wackenhut jobs?

A. Were any other people transferred from Lockheed jobs to other jobs?

Q. Were any guards transferred from Lockheed job to another job that Wackenhut has?

A. Not to my knowledge.

Q. And would the company records, or would this be the kind of matter that you would have personal knowledge of?

A. No, not necessarily because we have many jobs.

Q. The company records would indicate the number transferred [Tr. p. 156] in and out?

A. Searching of payroll records, I imagine this information could be determined.

Q. Now, Captain Frazier did have authority to hire employees?

A. Yes, within the restrictions I have previously mentioned in testimony.

Q. Now, did Captain Frazier have authority to discharge employees?

A. Yes, he did.

Q. And would his action be subject to approval of anybody in the company?

A. Certainly, it would be subject to the approval of the manager of physical security and my approval.

Q. Would he take the action before getting this approval or take the action and then get approval afterward; if that's not the way it works, how did it work?

A. I couldn't answer that because I don't recall if anyone was discharged by Captain Frazier.

Q. Was anybody disciplined?

A. Yes, I can state to my own knowledge there were disciplinary measures taken of the guards during that period of time, yes, sir.

Q. Did Captain Frazier get approval before taking those actions?

A. Yes, sir, he filed a report.

[Tr. p. 157.]

Q. And then after the report was approved, he would take the action that he wanted to?

A. He would take the action that he was instructed to take.

Q. Now, where do the employees get their uniforms from?

A. Well, speaking of all of our employees in the State of California, they get them from various locations, depending on the location where they are assigned.

Q. Where would Lockheed get them?

A. They would come into headquarters.

Q. Where is the payroll for Lockheed job kept?

MR. GREGORY: Objection, repetitive.

TRIAL EXAMINER: I don't recall it. Overruled.

THE WITNESS: The payroll records of the company are kept in Coral Gables, Florida. The payroll is, of course, made up locally.

Q. (By Mr. Swerdlow) Where was the Lockheed payroll made up?

A. The Lockheed payroll form as such was made up by the supervisors and any record, any copies of that are kept in our headquarters office in Los Angeles.

Q. The supervisor being Captain Frazier at that time?

A. Not kept in his post office, but in the office on Serrano Avenue.

Q. Now, who was the area supervisor, who supervised the Lockheed job?

[Tr. p. 158.]

A. Captain Frazier.

Q. He was the area supervisor?

A. As well as the facility supervisor.

Q. Did he have any other jobs in that area?

A. What area?

Q. Whatever area he supervised.

A. He had none in Ontario, but in fact he did have that job I mentioned a few moments ago that was terminated several months ago—which I assume

was in Ontario because it was adjacent to the airport. His other jobs were located in other cities such as Pomona, Riverside, temporary job in San Bernardino, and again the jobs fluctuate, too.

Q. Approximately how many other jobs did he supervise, on the average? I understand it fluctuates—or can you give me the range of the fluctuation?

A. Geographical range?

Q. No, number range.

A. Approximately six jobs.

Q. How did he divide his time among the six jobs?

A. He devoted practically full time to the Lockheed job and comparatively little time to the other jobs, unless his particular duties required him to. His duties required him to be at Lockheed plant during his working hours.

Q. His office was at Lockheed plant?

A. Lockheed furnished him with an office.

[Tr. p. 159.]

Q. How would you estimate the percentage of time spent on matters related to Lockheed operation and the percentage of time related to the other operations?

A. I would assume that he probably averaged 60 hours a week and 40 of those were devoted to the Lockheed operation.

Q. You mentioned clearances that were needed for Lockheed job; through what offices were clearances obtained?

A. These were clearances with the United States Government.

[Tr. p. 160.]

Q. Now, where were the employees supplies kept? You already testified about uniforms, but they had

other supplies like billy clubs, weapons, pads of paper; where was that furnished from?

A. Would be furnished to them by Captain Frazier.

Q. Where would he get them?

A. He would, in turn, secure necessary supplies from our office in Los Angeles.

Q. Now, what about vehicles, did you have any vehicles on the Wackenhut job?

A. There was one vehicle at Lockheed.

Q. Where was that supplied from:

A. I can only presume it was supplied from headquarters; it was on that particular job when I arrived in this area.

[Tr. p. 161.]

Q. (By Mr. Swerdlow) When the contract with Lockheed terminated, what happened to the Wackenhut employees; you already testified Captain Frazier remained as a Wackenhut employee?

A. The other employees were terminated.

Q. All of them?

A. Yes, sir.

Q. Are there any of them now working for Wackenhut on other jobs?

A. Not to my knowledge.

Q. Does Wackenhut have any contracts with labor unions in your area, other than the one with United Plant Guard Workers?

A. Any other union?

Q. Or contract in this area?

A. I still need clarification. Any other union?

TRIAL EXAMINER: Any other contract with either United or any other labor organization?

THE WITNESS: Yes, sir.

[Tr. p. 162.]

Q. (By Mr. Swerdlow) In this area, your area?

A. California, yes, sir.

Q. How many? How many other contracts are there?

A. Only one of which I have knowledge. There may be another one which I have no knowledge.

Q. Where would that be?

A. Martinez area.

Q. Now, you have a branch in Santa Ana?

A. Yes, sir.

Q. What is the function at that branch?

A. An office which has an area supervisor and branch manager assigned to handle the operations, guard and other operations in Orange County.

Q. And the branch manager, is he the equal of the manager of physical security?

A. No, he is not.

Q. He reports to the manager of physical security?

A. Insofar as physical security matters are concerned.

Q. And the area supervisor, does he have the same duties as the other area supervisors?

A. His duties differ to the extent he is under a branch manager while the other area supervisors are not.

Q. Who are the others under?

A. The other area supervisors report to, directly to the manager of physical security.

[Tr. p. 163.] CROSS EXAMINATION

[Tr. p. 165.]

Q. (By Mr. Goldman) Of all these, approximately 36 jobs, that you had in and around, let's see, L. A. Metropolitan Area, including Riverside, Orange Coun-

ty, L. A. County, and [Tr. p. 166]San Bernardino County, how many of these jobs involved government security clearances?

A. I couldn't answer that question off hand, sir.

Q. Could you give us an approximation?

A. Would you restate the question?

Q. In Riverside County, one job you had in Riverside County, did that require government security clearance?

A. I don't believe so, to the best of my recollection.

Q. The ten operations that you had in Orange County, did any of them require government security clearance?

A. Yes, sir.

Q. Approximately how many of them?

A. Approximately four. Again, these figures must be approximate.

Q. Is this the same type of government security clearance as involved in Lockheed?

A. No, there are classifications of government security.

Q. Isn't that true that Lockheed Aircraft has top secret clearance?

A. It did have.

Q. At the time you were there?

A. Yes.

Q. Is this the highest possible clearance you can possibly get from the governmental agency?

A. From that particular governmental agency, it's the [Tr. p. 167] highest, as I understand it.

[Tr. p. 170.]

Q. What is the function of the personnel supervisor?

A. It is his responsibility to maintain the personnel records, to see that investigations are conducted on personnel hired; that he happens also to handle industrial relations, matters under my supervision within our organization here, and security clearances, security officer for this area.